Supreme Court, U.S.
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No. 99——

IN THE
Supreme Court of the United States

ABRAHAM D. SOFAER,
Petitioner,

v.

DISTRICT OF COLUMBIA COURT OF APPEALS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

H. BARTOW FARR, III
Counsel of Record
RICHARD G. TARANTO
FARR & TARANTO
1850 M Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 775-0184

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QUESTIONS PRESENTED

1. Whether, consistent with principles of due process, a State Bar may subject an attorney to disciplinary sanctions—under a vague, general standard—for conduct that, at most, creates an appearance of impropriety.

2. Whether, consistent with principles of due process, a State Bar may reformulate the particular disciplinary charges against an attorney after a hearing on the initial charges has concluded.

PARTIES TO THE PROCEEDING

The parties to the proceeding are Abraham D. Sofaer; the District of Columbia Court of Appeals; the District of Columbia Court of Appeals Board on Professional Responsibility; the District of Columbia Court of Appeals Board on Professional Responsibility Hearing Committee Number One; and the Office of Bar Counsel.

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Abraham D. Sofaer respectfully requests that a writ of certiorari issue to review the judgment of the District of Columbia Court of Appeals in this case.

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals (Pet. App. 1a) is reported at 728 A.2d 625. The Order of the Board on Professional Responsibility (Pet. App. 10a) and the Report and Recommendation of Hearing Committee Number One (Pet. App. 71a) are unreported.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on April 22, 1999. A timely petition for rehearing was denied on October 8, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Fifth Amendment to the United States Constitution reads in pertinent part: "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law. . . ."

Rule 1.11(a) of the District of Columbia Rules of Professional Conduct provides:

> "A lawyer shall not accept other employment in connection with a matter which is the same as, or substantially related to, a matter in which the lawyer participated personally and substantially as a public officer or employee."

STATEMENT

This case raises two questions under the due process clause. The first is whether long-established "void for vagueness" principles prevent a State Bar from disciplining an attorney based on nothing more than the possibility that he "may have received information" during his government service that might be useful in a later representation. Pet. App. 5a. Applying that standard, the District of Columbia Board on Professional Responsibility imposed a disciplinary sanction on petitioner, even though no showing was made that petitioner had actually received any relevant useful information. The court of appeals, holding that "the actual receipt of . . . information . . . is immaterial," affirmed. Pet. App. 5a (internal quotation marks omitted).

The second question is whether a State Bar may retroactively redefine the charges against an attorney after a hearing on the initial charges has concluded. Here, Bar Counsel charged that, under the standard noted above, petitioner might have received useful confidential information during his work on three specific government matters. Following the hearing, however, the Hearing Committee (in its Report and Recommendation) formulated

a new definition of the matter on which petitioner was said to have worked. The sanction against petitioner was then imposed (and upheld) on the basis of his participation in that reformulated matter.

1. These issues arise out of a disciplinary case brought against petitioner for undertaking a limited representation of Libya in connection with the tragic bombing of Pan Am Flight 103 over Lockerbie, Scotland. The case was the first—and remains the only—disciplinary case ever filed under the so-called "revolving door" provision, Rule 1.11(a), of the District of Columbia Rules of Professional Responsibility.[1] As a background to the due process questions raised by the proceedings themselves, and by the sanction ultimately imposed upon petitioner, it is necessary to review briefly both the work that petitioner performed at the Department of State and the nature of the limited representation of Libya that petitioner later undertook.

A. Work at the Department of State. The bombing of Pan Am Flight 103 took place on December 21, 1988. At that time, petitioner was serving as Legal Adviser to the Department of State (R. 22, p. 190). Following the bombing, the Justice Department launched an investigation to determine responsibility for it. At all times, the Justice Department kept control of the investigation exclusively in the hands of the Federal Bureau of Investiga-

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[1] Rule 1.11(a) reads as follows:

> "A lawyer shall not accept other employment in connection with a matter which is the same as, or substantially related to, a matter in which the lawyer participated personally and substantially as a public officer or employee."

As we discuss, *see* pages 15-17 *infra*, the District of Columbia Court of Appeals, in construing the language of this rule, has held that two matters are "substantially related" whenever "it is reasonable to infer counsel *may have received* information during the first representation that might be useful in the second. . . ." Pet. App. 5a (internal quotation marks omitted) (emphasis added).

tion, which worked with Scotland Yard on the matter. Neither petitioner nor any other person in the Department of State worked on or participated in the criminal investigation (R. 22, p. 191; R. 44, pp. 63-65).

Although petitioner played no role in the investigation itself, he received, along with approximately 25 other senior State Department officials, a daily classified briefing paper, which occasionally included general information concerning the investigation (R. 22, p. 191). Those briefings made no mention of Libya as the perpetrator of the bombings. Indeed, during the time that petitioner was Legal Adviser, the Justice Department had not identified Libya as the likely culprit (R. 8, Ex. 40; R. 22, pp. 208-09). Two other countries were suspects (R. 22, p. 206), and petitioner was involved in a diplomatic exchange with one of these countries (R. 22, p. 192-93).

As the criminal investigation was going forward, the families of the victims filed wrongful death suits against Pan Am, which were consolidated into a single proceeding, *In re Air Disaster at Lockerbie, Scotland*, before the United States District Court for the Eastern District of New York (the Civil Case). Pan Am, as sole defendant in the Civil Case, served non-party subpoenas on six agencies of the United States government, including the State Department, seeking documents related to its theory that the government had received advance warnings of the bombing (R. 8, Exs. 1, 2, and 3). The government investigated the theory and concluded that it was false and without merit. Petitioner had no personal involvement in the investigation of the theory, but did learn that it was meritless (R. 22, pp. 201-02; R. 23, p. 12).

The Justice Department had primary responsibility for the response of all six agencies to the subpoenas. It instructed each of the subpoenaed agencies, including the State Department, to review its files for several purposes: to determine whether the files contained any documents

responsive to the subpoena; to recommend to the Justice Department how it wanted the Department to respond to its subpoena; and to name someone to serve as a possible witness in testifying about any documents to be produced (R. 8, Exs. 1, 2, and 3). Petitioner did not participate in any way in the search of State Department records for documents responsive to the subpoena (R. 22 pp. 195-96). On the basis of the search, however, a memorandum was prepared in the Office of Legal Adviser, recommending to the Director General what the State Department response should be. Because this memorandum was directed to a higher official in the Department, it was sent in the names of the Chief of the Office of Counter-Terrorism and of the Legal Adviser. Petitioner read this memorandum, approved its recommendations, and initialed his name on it for forwarding to the Director General.

Petitioner did not personally prepare the memorandum or have any involvement in the circumstances leading to its preparation. He learned nothing about the contents of the documents that the State Department had reviewed and found responsive to the subpoena (R. 22, pp. 193-96; R. 23, p. 13). His only role consisted of reading and approving the recommendation in the memorandum, which on its face declared the Pan Am theory to be meritless. The memorandum dealt entirely with procedural issues, rather than with the case itself or the evidence uncovered (R. 8, Ex. 40). The Justice Department later succeeded in having the subpoenas quashed because the evidence established that the theory advanced by Pan Am had nothing to do with the Civil Case.[2]

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[2] Petitioner testified that he was asked by the Chief of Counter-Terrorism whether the designated State Department witness for documents should be told about a meeting between the Secretary of State, the Chief Executive Officer of Pan Am, and the Chief of Counter-Terrorism in which the theory advanced by Pan Am was

B. The Limited Agreement to Represent Libya. Petitioner left the State Department in mid-June 1990, after five years of service, and joined the law firm of Hughes, Hubbard & Reed (the "law firm"). At the time that petitioner left the State Department, he was unaware of any involvement of Libya in the Pan Am Flight 103 bombing, or of any evidence that Libya or Libyans might have been responsible.[3] Petitioner later learned from public reports, published over a year after he joined the law firm, that the Justice Department had indicted two Libyan terrorists for the bombing of Pan Am Flight 103 and that the United States had accused Libya of responsibility for the bombing. Thereafter, he also learned that the United Nations Security Council had adopted Resolutions demanding that Libya compensate the families of the victims and comply with requests by the United States and United Kingdom to surrender custody of the indicted terrorists.

In late 1992 petitioner was approached by an American attorney and asked if he would be interested in representing Libya with regard to its problems concerning Pan Am Flight 103. The uncontradicted evidence is that, while petitioner refused to accept a representation that would defend Libya in any way, he expressed possible interest in assisting Libya to satisfy its obligations under the Security Council Resolutions. Libya was prepared to discuss representation by petitioner on this basis (R. 22, pp. 210-11). After discussions between petitioner and representatives of Libya, petitioner and his law firm conditionally agreed to represent Libya for the limited purposes of attempting two settlements: a mutually acceptable agreement between Libya and the families, under

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discussed. Petitioner replied he knew of no reason why the witness should not be told. The theory by then had been proved meritless.

[3] The successor to petitioner as Legal Adviser testified that he had no reason to doubt the statement that petitioner learned nothing about Libya's involvement until long after he had left the State Department (R. 23, p. 204).

which Libya would compensate the families, and a mutually acceptable agreement between the United States and Libya with regard to the extradition of the two terrorists and the forum to which they would be surrendered.[4] Petitioner thereafter applied for and obtained licenses from the Treasury Department to commence the representation.[5]

The representation proved short-lived. News of the proposed representation produced a firestorm of negative coverage from the media, as well as protest and anger from families of some of the victims, who objected to any settlement with Libya (R. 22, p. 231). In light of the public criticism—some of which focused on petitioner's former service at the State Department—petitioner wrote

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[4] Petitioner had considerable experience at the State Department in effectively mediating similar confrontations between governments and families of victims. For example, he had successfully performed this function in negotiations between Chile and the private estates and families of assassinated diplomat Orlando Letelier and U.S. national Ronnie Moffet, for whose killing Chile ultimately accepted responsibility, without admitting culpability (R. 22, pp. 150-62). He arranged a settlement on the same basis for compensation by Iraq of families of seamen who were killed or wounded when Iraq aircraft fired two missiles at the USS Stark (R. 22, pp. 183-84). He also successfully negotiated a settlement whereby Egypt paid six Israeli families and one American for the killing of seven civilians at Ras Burqa by a demented Egyptian border guard (R. 22, pp. 182-83).

[5] Petitioner could not legally begin to provide legal services for Libya until he satisfied the licensing requirements of the Office of Foreign Assets Control of the Department of the Treasury ("OFAC"). (Libya had been placed under United Nations sanctions, and the United States had prohibited financial transactions or performance of services between United States citizens and Libya without a license from OFAC (R. 22, p. 56)). The conditional agreement with Libya was expressly contingent both on meeting these requirements and on checking for conflicts of interest. While petitioner and his law firm actually began to seek information in publicly available records and documents, petitioner spent much of his time in efforts to negotiate with officials of OFAC concerning the correct license that petitioner needed (R. 22, p. 70 and pp. 222-29).

to the Legal Adviser of the State Department, requesting his position on the proposed limited representation of Libya, and stating he would withdraw from any representation if the State Department believed that his prior service in the Department raised an ethical problem (R. 8, Ex. 25). The Legal Adviser undertook to investigate the matter.

Criticism of the representation continued in the press, however, and petitioner and the law firm soon decided not to continue with it.[6] Petitioner and the law firm stated that the unfavorable media and public reaction precluded petitioner from effectively developing a consensual plan to pay compensation acceptable to the families and to surrender the indicted defendants in a manner acceptable to the United States (R. 8, Ex. 30). At that point petitioner and his firm had provided no advice or other services to Libya on any issue. After withdrawing, the law firm returned the fee that it had received from Libya pursuant to a special license granted by OFAC for that purpose (R. 23, p. 112).

2. Acting on press reports and without receiving a formal complaint, Bar Counsel then initiated a disciplinary case against petitioner. Relying on Rule 1.11(a), *see* note 1 *supra*, Bar Counsel later alleged, in a Specification of Charges, that petitioner, while at the Department of State, had participated in three specific "matters" that were "substantially related to" his limited representation of Libya: "the interests of the government of the United States in connection with (a) acts of Libyan terrorism directed against the United States citizens, (b) the [Civil Case], and/or (c) the Criminal Case."[7] Fol-

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[6] The decision was announced approximately two weeks after the beginning of efforts to obtain the OFAC license and to complete other requirements of the agreement with Libya.

[7] The first of these matters involved a decision by the United States government to bomb Tripoli in retaliation for certain ter-

lowing the close of evidence, however, the Hearing Committee reformulated the charges. Observing that "Bar Counsel does not delineate in consistent terms the precise formulation of the 'matter' or 'matters' in which [petitioner] participated personally and substantially as a government lawyer," Pet. App. 113a, the Hearing Committee advanced its own definition of the relevant matter. According to the Hearing Committee, petitioner had personally and substantially participated in "the establishment of culpability for the 1988 Pan Am 103 bombing, including the government's investigation and the ensuing litigation concerning the bombing." Pet. App. 113a.

The Hearing Committee then found that this newly defined "particular matter" was "substantially related" to the representation of Libya. Relying on a prior court of appeals' decision, *see Brown v. District of Columbia Bd. of Zoning Adjustment*, 486 A.2d 37 (D.C. 1984) (*en banc*), the Committee stated that the critical inquiry on this question was whether "it was reasonable to infer that the lawyer *may have received* useful information during the government representation. . . ." Pet. App. 109a (emphasis added); *see also* note 1 *supra*. If so, the Committee said, "there would be a conclusive inference that useful information was in fact received." Pet. App. 109a. The Committee emphasized that, following the dictates of *Brown*, it "would not require proof that an attorney actually had access to or received privileged information in the prior case." Pet. App. 109a. As a result, acting upon the possibility that petitioner might have received useful information, the Committee, by a divided

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rorist acts by Libya. The Hearing Committee concluded that this matter—which took place in 1986, four years before the bombing of Pan Am Flight 103—was unrelated to the subsequent representation of Libya in connection with the Pan Am bombing. Pet. App. 113a-117a. It is no longer part of this case.

vote, recommended the sanction of an "informal admonition." [8]

The Board on Professional Responsibility, with one dissent, imposed the recommended sanction. Like the Hearing Committee, the Board made clear that, in assessing petitioner's conduct, the decisive question was whether a reasonable person could infer that petitioner "may have received" useful confidential information, not whether he had actually done so. Pet. App. 44a. The Board reiterated that, in order to support a disciplinary sanction, there was no need for "proof that an attorney actually had access to or received privileged information in the prior case." Pet. App. 45a; *see also* Pet. App. 58a. In keeping with that view, it further declared that a lawyer charged under Rule 1.11(a) could not defend himself by showing that "no useful information was in fact received during the government representation." Pet. App. 44a. The Board thus upheld, against due process objections,[9] the use of a "conclusive inference" to impose liability based on the possibility that the lawyer might have received information, even though he, in fact, had not. Pet. App. 57a-58a.

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[8] An informal admonition, at one time, was not regarded in the District of Columbia as establishing an ethical violation and was kept confidential. That is no longer the case. Since the District of Columbia determined that only ethical violations should receive sanctions, and that no sanction should be confidential, an informal admonition is now a public sanction for an ethical violation.

We note that petitioner may also be subject to reciprocal punishment in California and New York on the basis of this sanction, without any independent determination by those States. Both California and New York require petitioner to report the results of this proceeding.

[9] Petitioner argued before the Board that use of a conclusive inference to impose punishment impermissibly relieved Bar Counsel of the burden of proving actual misconduct. *See* Opening Br. at 16-18.

The Board also rejected the argument that reformulation of the charges by the Hearing Committee denied petitioner fair notice. *See* Pet. App. 51a; *see also* Opening Br. at 52-59 (making fair notice argument). Although the Board acknowledged that "Bar Counsel's original formulation was not identical to the Hearing Committee's articulation," Pet. App. 51a, it excused the deviation on the ground that "[petitioner] was fully aware of the gravamen of the charges against him." Pet. App. 51a. The Board went on to state that, "[i]n any event, the charge against [petitioner] never changed during the course of the proceedings. . . . At issue always was a single violation of Rule 1.11(a)." Pet. App. 51a-52a.

The court of appeals affirmed. Although it largely relied on the Board report, it, too, made clear that, petitioner's objections notwithstanding, the governing legal standard under Rule 1.11(a)—heretofore applied only in disqualification cases—was satisfied by evidence of appearances, rather than proven misconduct. *See* Pet. App. 5a. *See also* C.A. Br. at 27 (addressing vagueness of Rule 1.11(a)); C.A. Br. at 18, 30 (discussing improper burden shifting). The court explained that "Rule 1.11(a) bars participation in overlapping government and private matters where 'it is reasonable to infer counsel may have received information during the first representation that might be useful to the second. . . .'" Pet. App. 5a. It then stated flatly: "'the actual receipt of . . . information,' and hence disclosure of it, is immaterial." Pet. App. 5a (quoting *Brown*, 486 A.2d at 50).[10]

REASONS FOR GRANTING THE WRIT

1. This case raises a question of great importance for lawyers and former government officials: whether they may be subjected to punitive sanctions, under a vague

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[10] Four of ten judges subsequently voted to grant rehearing en banc. The motion was denied. Pet. App. 141a.

general standard, for conduct that, at most, creates an appearance of impropriety. Here, the court of appeals held that Rule 1.11(a) of the District of Columbia Rules of Professional Conduct, the so-called "revolving door" rule, authorizes a disciplinary punishment—for undertaking representation in "substantially related" matters—so long as "it is reasonable to infer that counsel *may have received* information during [his prior government service] that might be useful [in a subsequent private matter]." Pet. App. 5a (internal quotation marks omitted) (emphasis added). In so doing, the court of appeals made clear that, under its construction of the rule, appearances, not actual facts, were dispositive, stating unequivocally that " 'the actual receipt of . . . information,' and hence disclosure of it, is immaterial." Pet. App. 5a (quoting *Brown v. District of Columbia Bd. of Zoning Adjustment*, 486 A.2d 37, 50 (D.C. App. 1984) (*en banc*)). *See also Committee for Washington's Riverfront Parks v. Thompson*, 451 A.2d 1177, 1188 (D.C. App. 1982) (*Riverfront Parks*) (revolving door rule "is intended to prohibit conduct which would present even the appearance of impropriety"). Thus, even though petitioner had not, in fact, received any information that would be useful to his private client, the court of appeals upheld the sanction imposed upon him.

The use of a broad appearance-based standard to impose discipline is fundamentally inconsistent with established principles of due process. In the first place, a disciplinary rule condemning improper appearances is, by definition, a rule dependent on the eye of the beholder. As such, like any vague law, it is highly unlikely "to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the [law]." *United States v. Harriss*, 347 U.S. 612, 617 (1954); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972); *City of Chicago v. Morales*, 119 S. Ct. 1849, 1859 (1999).

To determine whether the revolving-door rule bars a proposed representation, for example, a lawyer must engage in the almost metaphysical task of asking himself whether some information that he did not receive during his government service—but that a hypothetical observer could infer that he "may have received"—might turn out to be useful in the representation of a private client. A law requiring this sort of guesswork, cabined by little more than the limits of a reasoned imagination, is simply too uncertain a foundation on which to rest punishment of a quasi-criminal nature. *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048 (1991) (invalidating disciplinary sanction on due process grounds).

A punitive sanction based on hypothetical third-party perceptions also presents an impermissible risk of arbitrary enforcement. As this Court has observed, the most critical concern about vague or imprecise laws is that they fail to "establish minimal guidelines to govern law enforcement." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). Rule 1.11(a) presents a classic example. Because its application turns on inferences drawn by a hypothetical person—*i.e.*, whether to surmise that a lawyer "may have received" useful confidential information—it opens the door to what is, by necessity, a highly subjective inquiry. Enforcement officials are thus left free to target persons based as much on their own individual views about the conduct at issue as on any objective evidence of wrongdoing. Indeed, it is a striking fact that petitioner—who received extensive public criticism for agreeing to represent Libya, an obviously unpopular client—is the only lawyer ever disciplined under Rule 1.11(a) or its predecessors.

The past several decades have seen a marked increase in generally-worded laws that, in an effort to promote public confidence, prohibit conduct that might raise even an appearance of improper behavior. *See, e.g.*, 28 U.S.C.

§ 455(a). In their usual application—as grounds for prospective disqualification—these broad prophylactic laws generally have a salutary effect: they provide additional reassurance about the integrity of public and professional activities at a relatively low cost to the affected individuals. But the use of an appearance-based standard to impose punishment after-the-fact is a different matter. No lawyer or government official should be subjected to sanctions on the ground that he "might have received" information that he did not, in fact, receive. That is precisely what happened in this case, and it merits further review by this Court.

2. A second due process problem arises in this case as well. This Court has observed that "[f]ew constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused." *Dunn v. United States*, 442 U.S. 100, 106 (1979). Here, however, petitioner was sanctioned, not on the basis of the "specific charges" brought by Bar Counsel, but on the basis of a reformulation of those charges—in particular, a recasting of the government "matters" in which petitioner was said to have been involved—by the Hearing Committee assigned to hear the case. The Board on Professional Responsibility explicitly relied on that reformulation (rather than the original charges) in imposing the sanction, and the court of appeals affirmed on that basis.

This departure from the "specific charges" is not a matter of form over substance. To the contrary, it is the height of unfairness to put a defendant to his defense on a particular set of charges and then, after proceedings have concluded, find him liable on a different charge, involving critical differences in the relevance and weight of evidence. The inequity is all the more pronounced in a case like the present one where the ultimate issues—whether various "matters" are "substantially related" or whether participation was "personal and substantial"—

turn upon a mixture of suppositions and inferences that makes it especially critical to know in advance what matters are at issue. The fact that petitioner was denied that notice is a separate issue warranting the attention of this Court.

I. A. State bar associations have long been concerned with promoting public confidence in the conduct of lawyers. *See, e.g., Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 635 (1995) (noting state interest in "preventing the erosion of confidence in the profession.") Much of that effort has historically been focused on assuring that lawyers do not engage in dishonest or unethical behavior, but, in recent years, State Bars have increasingly sought to regulate, not just conduct that is in fact improper, but also conduct that might create an appearance of wrongdoing. *See* Flowers, *What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 Mo. L. Rev. 699 (1998). While the most prominent example of this type of regulation is Canon 9 of the once widely-adopted Model Code of Professional Responsibility—which directly admonished that "A Lawyer Should Avoid Even the Appearance of Professional Impropriety"—more specific rules, less sweeping on their face, also contain broad prophylactic standards to protect the profession against a loss of public support. Despite their good intentions, however, these latter rules, like the broader proscription of Canon 9, can raise serious questions about fair notice and even-handed enforcement.[11]

The District of Columbia "revolving-door" rule raises just such questions. *See* Rule 1.11(a). Although the rule —which bars former government attorneys from undertaking certain private representations—contains no overt appearance-based standard, the District of Columbia

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[11] Canon 9 has been widely criticized on the ground that it is vague and subject to inconsistent enforcement. *See* Flowers, *supra*, at 712-19.

Court of Appeals has held that the rule goes well beyond a prohibition of actual misconduct, declaring that it is "intended to prohibit conduct which would present even the appearance of impropriety." *Riverfront Parks,* 451 A.2d at 1188. The court has thus broadly construed both the predecessor and current rules in order to prevent " 'the appearance if not the actuality of evil.' " *Brown v. District of Columbia Bd. of Zoning Adjustment,* 486 A.2d 37, 44 (D.C. App. 1984) (*en banc*) (quoting *United States v. Standard Oil Co.*, 136 F. Supp. 345, 364 (S.D. N.Y. 1955)). Using far-reaching language once associated with the explicit appearance-of-impropriety standard of Canon 9, *see, e.g., Woods v. Covington County Bank,* 537 F.2d 804, 813 (5th Cir. 1976), the court has emphasized that, rather than targeting some specific impropriety itself, the revolving-door rule is instead "designed to address at least *a reasonable possibility* that some specifically identifiable impropriety would occur." *Brown,* 486 A.2d at 48 (emphasis added) (internal quotation marks omitted). *See also* Pet. App. 62a (preventing the appearance of impropriety is an important consideration underlying Rule 1.11(a)).

To make sure that the revolving-door rule bars even a "reasonable possibility" of misconduct, the court of appeals, in construing its terms, has taken two critical steps. First, in order to determine whether a lawyer has worked on two "substantially related" matters, the court has set a low substantive standard that is specifically grounded in possible, not actual, wrongdoing: that is, whether, taking into account only the rough outlines of each representation, " 'it is reasonable to infer counsel *may have received* information during the first representation that might be useful to the second. . . .' " Pet. App. 5a (quoting *Brown,* 486 A.2d at 50) (emphasis added). Then, to implement that standard, the court has put into place a "conclusive inference" that a lawyer who may have received useful information actually did receive it. *See Brown,* 486 A.2d

at 50; Pet. App. 44a. This conclusive inference assures that a violation of the rule can be found solely on the basis of what might have happened, without proof of what actually did happen. Indeed, as the court made clear, " 'the actual receipt of . . . information,' and hence disclosure of it, is immaterial." Pet. App. 5a (quoting *Brown*, 486 A.2d at 50).[12]

The problem with this loose assemblage of possibilities and inferences is that, while it serves to broaden the scope of the rule, it does so at the price of needed clarity: in the end, it makes the rule intolerably vague. *See, e.g., Kolender v. Lawson*, 461 U.S. 352, 358 (1983); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *United States v. Reese*, 92 U.S. 214, 221 (1876). Thus, contrary to basic principles of due process, it forces lawyers subject to its broad prophylactic restrictions to speculate about "what conduct is prohibited." *Kolender*, 461 U.S. at 357; *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966). Because those faced with possible punishment "are entitled to be informed as to what the State commands or forbids," *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939), a law must "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the [law]." *United States v. Harriss*, 347 U.S. 612, 617 (1954). A punitive law cannot meet that standard unless it establishes an intelligible boundary between innocent and unlawful activities. *See City of Chicago*, 119 S. Ct. at 1859 (plurality opinion); *see also Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (law unconstitutionally vague if "men of common intelligence must nec-

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[12] This Court has said that irrebuttable presumptions—which, of course, may dramatically alter the proof necessary to establish a violation of law—are generally disfavored. *See Vlandis v. Kline*, 412 U.S. 441, 446 (1973). In this case, the effect of the presumption is to equate appearances of impropriety and actual impropriety, thereby allowing discipline to be imposed on the basis of the former alone. As we discuss in the text, that is too imprecise a standard to support a punitive sanction.

essarily guess at its meaning") (internal quotation marks omitted).[13]

The line drawn by Rule 1.11(a), however, is all but invisible. To begin with, given its grounding in appearances rather than historical facts, Rule 1.11(a), as construed, provides only the most uncertain indication of "what conduct is prohibited." *Kolender*, 461 U.S. at 357. The speculative nature of the substantive standard, combined with the conclusive inference that possible receipt of information is actual receipt of information, means that a conscientious lawyer, seeking to avoid the handling of substantially-related matters, cannot reliably assess the propriety of a proposed new representation by carefully reviewing the confidential information that he actually received during his government service. Instead, to satisfy Rule 1.11(a), he must engage in an entirely fictional inquiry: whether it is possible that a hypothetical third party—with only the most general awareness about his government activities and no real understanding of his work—could infer that he "may have received" information of possible use in the new representation. Even with the best of intentions, no lawyer can be confident that his answer to this hypothetical question will, in hindsight, be regarded as correct. The very uncertainty of the inquiry "creates a trap for the wary as well as the unwary." *Gentile*, 501 U.S. at 1051.[14]

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[13] A bar disciplinary proceeding is quasi-criminal in nature. *See In re Ruffalo*, 390 U.S. 544, 551 (1968). Although the punishment struck down in *In re Ruffalo* was disbarment, the Court has also applied the due process clause—in particular, applied "void-for-vagueness" principles—to strike down a "private reprimand" imposed by the Nevada State Bar. *See Gentile*, 501 U.S. at 1048-51. That punishment is comparable to the informal admonition imposed on petitioner in this case.

[14] It should be noted that the due process concern about vagueness applies to laws imposing punishment according to a general, appearance-based standard, not to laws that, in order to prevent appearances of impropriety, prohibit particular conduct in specific

The facts of this case well illustrate the nature of this trap. Petitioner testified that, in deciding whether he could ethically undertake even a limited representation of Libya, he considered whether he had obtained any useful confidential information and, after doing so, concluded that he had not. Far from being conclusive, however, this uncontradicted fact turned out to be irrelevant. The Board on Professional Responsibility emphasized that, under the analysis approved in *Brown*, there was no need for "proof that an attorney actually had access to or received privileged information in the prior case." Pet. App. 45a. Later in its opinion, the Board reiterated the point in no uncertain terms, declaring that "the test of the Rule imposes no burden on Bar Counsel to demonstrate what confidential information received in the government representation could be useful in the private representation." Pet. App. 58a. The court of appeals, even while agreeing that " 'no one has ever suggested any improper disclosure of confidences' " (Pet. App. 5a), went on to declare that "actual receipt of . . . information, and hence disclosure of it, is immaterial." Pet. App. 5a (internal quotation marks omitted). But, once *actual* receipt of information is eliminated as the basis of the ethical violation, what is left (the *possibility* of having received information) is simply too haphazard and uncertain a standard to justify a quasi-criminal sanction.[15]

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terms. There is no due process problem, for example, with a law that bars a judge from hearing a case involving a corporation in which he knows that he has a financial interest, even if the interest is insignificant. *See, e.g.*, 28 U.S.C. § 455(b).

[15] Although the Board asserted that "appearances [of impropriety] do not constitute or prove a violation," Pet. App. 62a, that conclusory disclaimer does not square with the standard it applied —a standard that unmistakably and unequivocally provides that the possibility of receiving confidential information and the fact of receiving confidential information are to be regarded as one and the same. Indeed, it seems oddly defensive for the Board to employ a broad prophylactic rule—intended, as the court of appeals ex-

The revolving-door rule also fails to satisfy a second requirement of due process: the obligation to "establish minimal guidelines to govern law enforcement." *Smith v. Goguen*, 415 U.S. 566, 574 (1974); *City of Chicago*, 119 S. Ct. at 1861. More than a century ago, this Court made clear that a legislature may not, by drafting an imprecise, all-inclusive law, "set a net large enough to catch all possible offenders," *Reese*, *supra*, 92 U.S. at 221, and then leave it to prosecutors and judges to sort out those to be punished from those to be left alone. *Id.* To comply with due process standards, therefore, a law must define the prohibited conduct "in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender*, 461 U.S. at 357. The critical "question is . . . whether [the law] is so imprecise that discriminatory enforcement is a real possibility." *Gentile*, 501 U.S. at 1051.

The prophylactic standard of Rule 1.11(a) plainly creates a genuine risk of arbitrary enforcement. By its very nature, the hypothetical character of the inquiry permits enforcement officials to put together their own web of inferences about what a lawyer might or might not have known, ultimately basing decisions about the initiation of disciplinary proceedings on their own views about the conduct in question. *See Smith*, 415 U.S. at 575 (noting that vague laws may lead to "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections"). This unchecked discretion raises several troubling problems. Most obviously, it gives Bar officials a license to pursue wholly innocent persons, acting on nothing more than the fact that their activities are

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plicitly said, to prevent even the appearance of impropriety (*Riverfront Parks*, 451 A.2d at 1188)—and then to deny that conduct raising such an appearance can amount to a violation under the rule.

nonconforming or controversial.[16] Furthermore, it brings into play the very real possibility that those officials will choose to invoke their free-floating power against "individuals or groups who may be the object of official displeasure." *Parker v. Levy*, 417 U.S. 733, 775 (1974) (Stewart, J., dissenting).[17]

The risk of arbitrary enforcement certainly cannot be ignored here. To date petitioner is the only attorney ever disciplined under Rule 1.11(a) or its predecessors, even though petitioner not only limited the nature of his representation at the outset, but withdrew from the representation after only two weeks, returning all compensation. This singling-out is all the more striking, given the fact that lawyers have often been *disqualified* under the very same standard, yet none has ever been *disciplined* for that violation. It could be, of course, that the decision to charge petitioner had nothing to do with disapproval of his representing Libya as a client, but the contrary is possible as well: after all, the charges were initiated after sharply critical public reaction to the representation and in the absence of any complaint from the Department of State (the former client) or from anyone else. It is thus entirely possible that, in pursuing this unique prosecution, enforcement officials may have been influ-

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[16] Vague standards give officials an additional power as well: the power to target even guilty persons without being put to the burden of proving actual misconduct on their part. Particularly when combined with the force of a conclusive inference, this power may allow for convictions based on mere suspicion of possible wrongdoing. *See Papachristou*, 405 U.S. at 169.

[17] The American Bar Association Committee on Ethics and Professional Responsibility, discussing the appearance-of-impropriety standard set forth in Canon 9 of the Model Code (*see* page 15 *supra*), pointed to the problems caused by use of that sort of standard to impose sanctions. *See* Formal Op. 342 n.17 (1985). In particular, the Committee expressed the concern that use of the standard would alter the nature of disciplinary proceedings "from the determination of fact issues specified by the rule into a determination on an instinctive, ad hoc, or even ad hominem basis." *Id.*

enced by their own negative views of the undertaking. Whatever may be the case, however, the point is that these questions arise precisely because the vague standard embodied in the revolving-door rule carries with it, at the very least, a "real possibility" of discriminatory enforcement. *See Gentile*, 501 U.S. at 1051.

B. This Court, on several occasions, has struck down laws that, like appearance-based ethical rules, make potential liability turn on the subjective perceptions of enforcement authorities or other third parties. Just last Term, for example, the Court invalidated an ordinance that allowed police officers to order dispersal of persons who, in the presence of a suspected gang member, " 'remain[ed] in any one place with no apparent purpose.' " *City of Chicago*, 119 S. Ct. at 1854. In so doing, the Court specifically noted that the standard set forth in the law was "inherently subjective" (*id.* at 1862), because it allowed enforcement to depend, not on whether the defendant actually had a purpose for being in a particular place, but on "whether some purpose is 'apparent' to the officer on the scene." 119 S. Ct. at 1862. *See also Kolender*, 461 U.S. at 353 n. 1 (law prohibiting loitering "without apparent reason or business"). Similarly, in *Coates v. City of Cincinnati*, 402 U.S. 611 (1971), the Court struck down an ordinance barring " 'conduct . . . annoying to persons passing by,' " 402 U.S. at 612, finding that the law embodied "an unascertainable standard." 402 U.S. at 614. Noting that "[c]onduct that annoys some people does not annoy others," the Court said that "the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." 402 U.S. at 614. *See also Papachristou*, 405 U.S. at 169 (observing that "[a] direction by a legislature to the police to arrest all 'suspicious' persons would not pass constitutional muster").

The same principles are applicable here. At bottom, it is fundamentally unfair for a State Bar to discipline an attorney based on speculation about what he might have done, rather than on proof of what he actually did. *See In re Ruffalo*, 390 U.S. at 556 (White, J., concurring in result) (disbarment of attorney impermissible "if reasonable attorneys would differ in appraising the propriety of that conduct"). While it is now commonplace to require lawyers and public officials to recuse themselves from matters that might raise even tenuous suspicions about improper behavior, *see, e.g.*, 28 U.S.C. § 455(a), it does not follow—as the "conclusive inference" under Rule 1.11(a) would have it (*see* page 16 *supra*)—that an appearance of misconduct and genuine misconduct are actually the same thing, or that they may be treated as the same thing for all purposes. For example, it would seem highly doubtful that Congress, to promote public confidence in government officials, could make it a criminal offense for those officials to accept benefits that "might appear to be" in connection with an official action. *See generally United States v. Sun-Diamond Growers of California*, 119 S. Ct. 1402 (1999). That standard might be enough to support a prospective recusal from particular matters, but it is not a legitimate basis for retroactive imposition of criminal liability.[18]

By the same token, an ethical rule like Rule 1.11(a) provides proper grounds for disqualification of attorneys,

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[18] Although this Court held that an appearance of impropriety justifies vacating a judgment under Rule 60(b), Federal Rules of Civil Procedure, *see Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), the imposition of punishment stands on different footing. In *Liljeberg*, for example, the remedy simply left the parties in the same position that they had occupied before the conduct raising an appearance of impropriety took place. Here, by contrast, the sanction is a permanent form of punishment, expressing formal disapproval of the conduct at issue.

but not, as a general matter, for their discipline.[19] The same standard ("may have received information") applies in both contexts, of course, but its use for purposes of disqualification is different for several reasons. First, a disqualification proceeding does not put a lawyer at risk of punishment, either criminal or quasi-criminal; at most, he is denied the opportunity to represent a client. Second, and equally important, a disqualification proceeding does not leave a lawyer to imagine for himself what some hypothetical person might infer: a motion to disqualify, prospective in nature, is heard by a neutral judge, who has the authority to decide the applicability of the rule. These factors not only provide for clarity in advance, thus reducing concerns about fair notice, but also lessen the likelihood (and the costs) of arbitrary enforcement.[20]

Although the court of appeals agreed with Bar Counsel that petitioner should have sought added advice before undertaking his representation of Libya, the possibility of getting further guidance does little to solve the vagueness problem. Even leaving aside that petitioner did seek and

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[19] Rule 1.11(a) could, perhaps, be used for disciplinary purposes provided that Bar Counsel specifically pleaded and proved that a lawyer undertook a private representation where he knew, or should have known, that he had previously received useful confidential information during his government service. *See generally United States v. Nofzinger*, 878 F.2d 442 (D.C. Cir.), *cert. denied*, 493 U.S. 1003 (1989) (construing federal revolving-door statute).

[20] An actual impropriety standard for discipline (rather than disqualification) would not impose an insupportable burden on enforcement officials. Many rules and statutes already require proof of specific misconduct. *See, e.g.*, 18 U.S.C. § 207(a)(1) (requiring "knowing[]" violation); § 207(b)(1) (same). Furthermore, in the usual case, Bar Counsel should be able to obtain evidence from officials at the former client, claiming or stating (if that is the case) that the departed lawyer did receive privileged information of potential use in the new representation. What is striking here is that no official—either from the State Department or from any other government agency—has alleged or even suggested that petitioner actually received any confidential information that would have disqualified him from the limited representation of Libya.

obtain a federal license to represent Libya, the fact is that, in the absence of a motion for disqualification, no forum exists in which an attorney may obtain an *authoritative* judgment on the validity of a proposed representation. At best, therefore, attorneys would be remitted to seek out other opinions—possibly right, possibly wrong—about whether the inferences at the heart of Rule 1.11(a) would or would not be drawn. Furthermore, it is not at all clear what weight those opinions, even if available,[21] might carry. No formal mechanism in the ethical rules allows the Legal Ethics Committee, for example, to offer a legally-binding "safe harbor" to lawyers inquiring about proposed representations, so the only safe course for lawyers to follow would be always to decline such representations. Finally, and in any event, the idea of tying the right to undertake a representation to prior consultation with enforcement authorities simply brings the problem full circle: it leaves lawyers faced with a vague law subject to the standardless discretion of officials charged with enforcing it.

The question thus remains: may a State Bar discipline an attorney for what he might have done, but did not, in fact, do? In our view, the answer is that it cannot. While appropriate for purposes of disqualification, that sort of standard is too vague and discretionary, when applied to impose quasi-criminal punishment, to comport with established principles of due process. At all events, however, we think that the question is an important one—particularly in the District of Columbia, where so many former government officials practice law—and it warrants the attention of this Court.

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[21] Although the court of appeals indicated that petitioner should have solicited the views of the State Department, the State Department plainly has no special expertise in applying the District of Columbia Rules of Professional Conduct. It is very doubtful, therefore, that the Department would give an opinion about the applicability of Rule 1.11(a) to a particular case.

II. To impose punishment under the revolving-door rule, Bar Counsel must demonstrate that a matter undertaken in private practice is "substantially related" to a matter in which the lawyer had personally and substantially participated as a government official. As just discussed, we believe that the standard used to decide this question is too imprecise to satisfy the dictates of due process. Due process also demands, moreover, that any punishment be assessed only after proof based upon clear and specific charges. *See In re Ruffalo*, 390 U.S. at 550. In the context of Rule 1.11(a), that obligation means, among other things, that prosecuting authorities must define the matter (or matters) said to have been handled during government service with sufficient particularity and consistency to permit a full defense. The failure to do so in this case amounts to a separate departure from due process requirements.

This Court has said that "[f]ew constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused." *Dunn*, 442 U.S. at 106. As a result, "it is as much a denial of due process to send an accused to prison following conviction for a charge that was never made as it is to convict him upon a charge for which there is no evidence to support that conviction." *Garner v. State of Louisiana*, 368 U.S. 157, 164 (1961). Although this principle has been applied most frequently in criminal cases, it is by now well-established that it applies to disciplinary proceedings as well. *See In re Ruffalo*, 390 U.S. at 550. Thus, an attorney faced with a charge of unethical conduct is entitled, as a matter of procedural due process, to "notice of the specific charge, and a chance to be heard in a trial of the issues raised *by that charge* . . . ." *Cole v. State of Arkansas*, 333 U.S. 196, 201 (1948) (emphasis added).

These principles notwithstanding, petitioner was ultimately disciplined on the basis of a "charge that was never

made." *Garner*, 368 U.S. at 164. In his Specification of Charges—the functional equivalent of a criminal indictment or information—Bar Counsel alleged that petitioner had participated in three, and only three, matters of possible relevance to his limited representation of Libya: "the interests of the government of the United States in connection with (a) acts of Libyan terrorism directed against the United States citizens, (b) the [Civil Case] . . . and/or (c) the Criminal Case." The Hearing Committee subsequently dismissed any attempt to rely on the first matter, *see* note 7 *supra*, and Bar Counsel failed to establish personal and substantial participation in the other two. Indeed, at the hearing, and before the Committee, Bar Counsel conceded that petitioner had not participated personally and substantially in the Criminal Case, stating: "I do not contend that Mr. Sofaer was personally and substantially involved in a criminal matter while he was at the State Department" (R. 23, p. 298). With respect to the Civil Case, the Hearing Committee agreed with petitioner that his "participation in the response to the [Pan Am] subpoena"—his most tangible action—was not personal and substantial participation in that case. Pet. App. 125a.

The Hearing Committee, however, did not limit itself to the three matters alleged in the Specification of Charges: rather it recommended a sanction on the basis of a new formulation of the "matter" at issue. Having observed that "Bar Counsel does not delineate in consistent terms the precise formulation of the 'matter' or 'matters' in which [petitioner] participated personally and substantially as a government lawyer," Pet. App. 113a, the Committee undertook, in its Report and Recommendation (issued *after* the hearing), to offer its own definition. According to the Committee, the relevant matter should be characterized as "the establishment of culpability for the 1988 Pan Am 103 bombing, *including* the government's investigation and the ensuing litigation concerning the bombing." Pet. App. 113a (emphasis added). After thus rewriting

the charge, the Committee went on to conclude that petitioner had participated personally and substantially in that redefined matter and, applying the appearance-based standard of Rule 1.11(a), that the matter was substantially related to the limited representation of Libya.

This retroactive broadening of the charges was anything but cosmetic in nature. Most significantly, it changed the focus of the charges from participation *in* the Civil and Criminal Cases—which, for petitioner, was minimal at most—to possible receipt of information *about* those cases, as well as any other possible activity related to the bombing. Thus, although Bar Counsel had already acknowledged that petitioner did not participate substantially in the Criminal Case (and petitioner had no reason to offer further evidence on that point), the Hearing Committee, applying its new formulation, repeatedly relied on the fact that petitioner received State Department briefings concerning the progress of the criminal investigation. Given the speculative nature of the revolving-door inquiry, this was a critical shift: it allowed the Committee to engage in full-blown conjecture, without any opportunity for rebuttal, about what those briefings might have contained. At the same time it gave petitioner no chance to show that his receipt of what were only sporadic generalized briefings about the investigation—briefings that occurred no more than a half-dozen times over a period of 18 months and reflected no reliance on Department of Justice sources—could not possibly support a conclusion of personal and substantial involvement in the "establishment of culpability for the 1988 Pan Am 103 bombing."

To impose punishment on the basis of a rewritten charge is the very antithesis of fair process. As this Court has recognized, disciplinary proceedings are "adversary proceedings of a quasi-criminal nature." *In re Ruffalo*, 390 U.S. at 551. Those responsible for initiating such proceedings are thus obliged to set out, in reasonably clear and certain terms, the particular basis of the ethical

charge, in order to assure that a lawyer accused of misconduct (like any other person subject to possible punishment) receives "fair notice of the charge." *Id.* at 550. In *In re Ruffalo,* the Court struck down a sanction of disbarment, on due process grounds, because, after disciplinary proceedings had commenced, "the charges [were] amended on the basis of testimony of the accused." 390 U.S. at 551. The situation here, though different in form, is the same in principle: after proceedings had commenced—indeed, after proceedings had *concluded*—the Hearing Committee altered the charges against petitioner so that, in the end, he was disciplined on the basis of "a charge not made." *De Jonge v. State of Oregon*, 299 U.S. 353, 362 (1937).

The Board, while acknowledging that "Bar Counsel's original formulation was not identical to the Hearing Committee's articulation," Pet. App. 51a, nevertheless found no due process problem, stating, *inter alia*, that "[petitioner] was fully aware of the gravamen of the charges against him . . . ." Pet. App. 51a. But this observation totally misses the point. While petitioner undoubtedly knew the "gravamen" of the charges against him in some general sense—*i.e.*, he knew of the allegation that he might have obtained potentially useful information during his government service—the actual charges, set forth in the significantly-named Specification of Charges, were that he might have received information as a result of participation *in three identified "particular" matters.* The case having been limited to those matters, and the defense have been put on notice to respond only with respect to those matters, it was not permissible for the Hearing Committee then to redefine the limits of the government matter at issue, making the overall inquiry add up to more than the sum of its parts. Whether or not the overall "gravamen" of the charges remained the same, petitioner was entitled, as a matter of due process, to have notice of the "specific charges" that made up the

violation of which he was accused, and an opportunity to disprove those charges. The post-hearing reformulation of the charges deprived him of that right.[22]

The Board also declared that, "[i]n any event, the charge against [petitioner] never changed during the course of the proceedings. . . . At issue always was a single violation of Rule 1.11(a)." Pet. App. 51a-52a. But this declaration reflects the same basic misunderstanding: *i.e.*, that it is somehow acceptable, and consistent with principles of due process, to keep the shell of a charge (a violation of Rule 1.11(a)) while changing the particulars of that charge (the matters in which the lawyer is alleged to have participated). The purpose of fair notice is not simply to advise an accused about the legal basis of a charge, or even to inform him, in some general way, about what the prosecution is trying to prove; it is to give him a fair opportunity to defend against the "specific charges" lodged against him. The proper application of that important principle in disciplinary proceedings warrants further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

H. BARTOW FARR, III
Counsel of Record
RICHARD G. TARANTO
FARR & TARANTO
1850 M Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 775-0184

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22 The Board noted that petitioner did not raise his objection before the Hearing Committee. Pet. App. 51a. But the reformulation of the charges occurred in the Report and Recommendation issued by the Committee *after the hearing*. Petitioner then challenged the reformulation in his brief to the Board. That is all the rules required him to do.

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 97-BG-109G

IN RE: ABRAHAM D. SOFAER,
Respondent.

On Exception of Respondent to Report and Order
of the Board on Professional Responsibility

(Argued April 29, 1998 Decided April 22, 1999)

Before FARRELL and RUIZ, *Associate Judges,* and KING,* *Senior Judge.*

FARRELL, *Associate Judge*: This case is before us on exceptions to the report and order of the Board on Professional Responsibility (the "Board") directing Bar Counsel to issue an informal admonition to respondent for having violated Rule 1.11(a) of the District of Columbia Rules of Professional Conduct. The rule states in relevant part:

> A lawyer shall not accept other employment in connection with a matter which is the same as, or substantially related to, a matter in which the lawyer participated personally and substantially as a public officer or employee.

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* Judge King was an Associate Judge of the court at the time of argument. His status changed to Senior Judge on November 23, 1998.

A hearing committee and the Board both concluded that respondent had violated this rule by undertaking to represent the government of Libya in connection with criminal and civil disputes and litigation arising from the 1988 bombing of Pan American Flight 103 over Lockerbie, Scotland, after respondent, while serving as Legal Advisor in the United States Department of State, took part personally and substantially in the government's investigation of the bombing and in related diplomatic and legal activities.

We sustain the Board's order and adopt its comprehensive report, which sets forth (and in turn adopts) the hearing committee's findings of fact,[1] correctly explains the elements of a Rule 1.11(a) violation, and demonstrates why Bar Counsel proved by clear and convincing evidence that respondent violated the Rule. We limit ourselves to the following discussion, which presupposes familiarity with the Board's report, annexed hereto.

1. Respondent argues that in defining the "matter" in which he took part while Legal Advisor as "the legal activities flowing from the government's efforts to address [the Pan Am 103 bombing]," the Board bundled together activities so diverse in nature as to give him no fair warning of a potential overlap when he accepted the private representation of Libya. We are not persuaded. The activities in question, including diplomatic intervention with an unnamed country, attendance at confidential briefings on the criminal investigation, and overseeing the State Department's response to civil third-party subpoenas, all

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[1] This court must accept the findings of fact made by the Board unless they are unsupported by substantial evidence of record. D.C. Bar R, XI, § 9(g) (1998). The Board, in turn, must accept the hearing committee's factual findings if similarly supported. *See, e.g., In re Michael*, 610 A.2d 231, 234 (D.C. 1992).

centered about a distinct historical event involving specific parties,[2] whether or not all had been identified. As the Board recognized, "The 'matter' is not terrorism, or even Libyan terrorism"; rather, "[t]he core of fact at the heart of each piece of legal activity is . . . why and how Pan Am 103 blew up over Lockerbie." The contours of the bombing and the government's investigation and related responses to it were defined sharply enough to constitute a "matter" under the Rule.

2. Respondent contends that his work as Legal Advisor concerned the Pan Am 103 bombing in ways that were too marginal, infrequent, or passive to amount to "personal and substantial" participation in the matter. The main feature of the government's response, he asserts, was the criminal investigation conducted by the Department of Justice, not the Department of State; State's role (hence respondent's) consisted largely of a routine response to a third-party subpoena issued by Pan Am[3] in furtherance of its theory that the U.S. government had advance warning of the bombing but failed to act.

Respondent's discounting of the subpoena as routine depends partly on hindsight: the district court eventually quashed the subpoena. Until then, however, the subpoena had the potential of embroiling the government in the tort litigation, and so respondent's role in reviewing and approving the memorandum recommending the State Department's response to the subpoena cannot be considered perfunctory. But his participation went further. After Pan Am voiced its theory of government foreknowledge at a meeting with the Secretary of State which respondent

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[2] *See* Rule 1.11(a), comment [3] ("*'Matter'* . . . encompass[es] only matters that are particular to a specific party or parties.").

[3] The subpoena was issued in the mass tort litigation brought against Pan Am by relatives of the Pan Am 103 victims.

either attended or knew of, respondent's judgment was sought on whether, or how fully, to inform the Department's designated witness in the subpoena matter of the meeting, in preparation for his testimony. That action, as Bar Counsel points out, did not become "insubstantial" because the legal judgment was easily arrived at or because the government subsequently concluded that Pan Am's theory of government complicity was unsupported.

Moreover, respondent's actions take on added significance when viewed in the context of his participation, as one of a small number of senior State Department officials, in confidential oral and written briefings which periodically included information about the progress of the criminal investigation and related diplomatic actions. The fact that respondent played no role in the investigation itself and was not shown to have recommended or taken action based on the briefings [4] is not critical. As the Board explained, "Respondent was much more than the passive recipient of general agency information. As chief legal officer of the State Department, [he] was kept abreast of the progress of the investigation and the diplomatic efforts in response to the bombing precisely so that he could provide legal advice and perform legal duties concerning the bombing when called upon to do so."

All told, respondent's active participation in the Pan Am 103 matter bears no resemblance to the merely peripheral or formal involvement in a matter which the Rule does not encompass. *See* Opinion No. 84, D.C. Bar Legal Ethics Committee (1980) (interpreting former DR 9-101).

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[4] An apparent exception was respondent's participation, occasioned by the Pan Am 103 bombing, in a diplomatic exchange with an unnamed country intended to persuade the country to abate terrorist activity.

Respondent's assertion that by emphasizing his receipt of confidential information from the briefings the Board confused Rule 1.11(a) with Rule 1.6 (restricting use of client confidences or secrets) is mistaken. While he is correct that "no one has ever suggested any improper disclosure of confidences by Respondent," Rule 1.11(a) bars participation in overlapping government and private matters where "it is reasonable to infer counsel may have received information during the first representation that might be useful to the second"; "the 'actual receipt of . . . information,' " and hence disclosure of it, is immaterial. *Brown v. District of Columbia Bd. of Zoning Adjustment*, 486 A.2d 37, 50 (D.C. 1984) (en banc) (citations omitted).

3. Rule 1.11(a) prohibits a lawyer from accepting employment in connection with a matter "the same as, or substantially related to," a matter in which he or she took part as a public officer or employee. The inquiry is a practical one asking whether the two matters substantially overlap.[5] Respondent insists that he stayed clear of that overlap by restricting the terms of his agreement to represent Libya so as to "assum[e] Libya's culpability for the [Pan Am 103] bombing." A lawyer may, of course, limit the objectives of a representation with client consent. Rule 1.2(c). But respondent's retainer agree-

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[5] As the Board explained, Rule 1.11(a) carries forward the test and methodology for determining whether matters are "substantially related" set forth in *Brown, supra*. *See* Rule 1.11(a), comment [4]. *Brown* "broadened the scope of the 'substantially related' test" over that applicable to side-switching in the private sphere. 486 A.2d at 50. At the same time, the Board recognized that we deal in this case with attorney discipline and not (as in *Brown*) a conflict of interest issue arising from a civil dispute. Thus, the Board was careful to view respondent's conduct, including the "substantial" overlap of the two matters, from the perspective of Bar Counsel's obligation to prove an ethical violation by clear and convincing evidence.

ment exemplifies why, in our view, limiting the private representation rarely will succeed in avoiding the convergence addressed by Rule 1.11(a). While stating that "[the firm's] efforts will not include substantial activities as litigators but rather would be limited to activities associated with agreed upon measures, including consensual dispositions," the agreement emphasized that "[m]easures will be taken only with your [*i.e.*, Libya's] prior consent, and *without admission of liability*" (emphasis added). The proposed activities included "investigating the facts and legal proceedings, preparing legal analyses, providing legal advice and proposing legal steps to deal with" the "ongoing civil and criminal disputes and litigation" stemming from the destruction of Pan Am 103—all clearly features of a comprehensive attorney-client relationship. We do not question the sincerity of respondent's belief that the representation could be insulated, factually and ethically, from the investigation and diplomatic efforts of which he had been part. The "substantially related" test by its terms, however, is meant to induce a former government lawyer considering a representation to err well on the side of caution. Respondent did not do so.[6]

4. Respondent points to the exact words "accept other employment" in the Rule and makes an argument which neither the Board nor the hearing committee addressed.

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[6] Our holding in *Brown, supra*, that the several transactions at issue in that case were not substantially related, hence were not the same "matter," comports with our conclusion here. That holding, although ultimately a "legal conclusion . . . for this court to make," 486 A.2d at 54, rested critically upon findings of fact by the administrative agency negating any overlap between the earlier zoning matters and the later one. *Id.* at 52-58. Here, in contrast, the hearing committe made factual findings fully supporting our conclusion that respondent's representation of Libya was substantially related to his involvement as Legal Advisor in the post-bombing governmental actions.

To conclude that he had accepted employment on behalf of Libya, he maintains, the Board had to find "that [his] conditional agreement to represent Libya was capable of being legally carried out," which required that the firm obtain the necessary OFAC authorization [7] for the representation—a critical part of which was not received before he and his firm withdrew from the representation—Bar Counsel counters that the reason neither the Board nor the hearing committee considered this argument is that it was not raised until now and thus has been waived. *See, e.g., In re James,* 452 A.2d 163, 168 (D.C. 1982). We have examined all of respondent's arguments to the hearing committee and the Board and can, indeed, find none directed to "what constitutes 'accept[ing] other employment.'" (Br. for Resp. at 38). His arguments instead focused entirely upon the meaning and application of the terms "matter," "substantially related," and "participated personally and substantially." We thus would be well within our authority to disregard the present argument.

In any event, we reject it on the merits. Respondent did not just conditionally *agree* to represent Libya—the representation actually began after four things took place: OFAC issued a specific license authorizing respondent's firm to receive fees and expenses in connection with the pending criminal and civil cases affecting Libya; the firm received a letter of credit from Bank Credit Suisse for $2.5 million, ensuring payment of Libya's legal fees; the firm issued a press release announcing the representation and its receipt of the license from OFAC; and the firm received the first $250,000 installment of the legal fees.

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[7] OFAC is the government agency that administers economic sanctions imposed on foreign countries by the United States, including sanctions imposed on Libya in 1986.

Thereafter, respondent and the firm performed the services summarized in paragraph 52 of the Board's report which included, but were not limited to, resolving continued differences with OFAC as to the correct license needed to carry on the representation. In these circumstances, it would be a wholly artificial reading of the Rule to say that respondent had not "accept[ed the] employment" before withdrawing from it two weeks later for reasons unrelated to OFAC permission.[8]

5. Joined by *amici curiae* who are former government officials, respondent urges that finding an ethical violation in this case will deter District of Columbia lawyers from entering the government or serving for long once there, lest Rule 1.11(a) trip them up after they enter private practice. We are sensitive to the concerns, already voiced in *Brown, supra,* that over-zealous application of the revolving-door rule would be "at the cost of creating an insular, permanent legal bureaucracy." 486 A.2d at 47. But that concern is misplaced here. Our finding that respondent violated Rule 1.11(a) is well within the heartland of Rule 1.11(a)'s application. Further, Bar Counsel aptly states why no lawyer need find himself inadvertently in the position of risk that respondent and amicus hypothesize:

> A former government lawyer in the Respondent's position is free to solicit the views of his or her former agency concerning the proposed private legal undertaking (which the Respondent deliberately elected not to do in this case), or to consult with ethics advisers in his or her law firm (which, again, the Respondent seems not to have done concerning

[8] The fact that respondent's representation of Libya lasted so briefly is a separate consideration which, we agree with the Board, went to the issue of appropriate sanction, not violation.

Rule 1.11) or with the Legal Ethics Committee of the Bar (which the Respondent never suggested he did). If, while in government service or while contemplating entry into such service, the attorney deliberates the prospect that Rule 1.11 will narrow somewhat the career choices and client selections available to the attorney following departure from the government, then the Rule will have served one of its salutary objectives.

We affirm the Board's conclusion that respondent violated Rule 1.11(a) and the Board's order directing Bar Counsel to issue an informal admonition.

So ordered.

APPENDIX B

DISTRICT OF COLUMBIA COURT OF APPEALS BOARD ON PROFESSIONAL RESPONSIBILITY

Bar Docket No. 280-93

In the Matter of:
ABRAHAM D. SOFAER, ESQUIRE,
Respondent.

ORDER OF THE BOARD ON PROFESSIONAL RESPONSIBILITY

I. INTRODUCTION

On December 21, 1988, Pan American Flight 103 was blown up over Lockerbie, Scotland, killing everyone on board and 11 people in the town below. The United States undertook an intensive investigation to identify the perpetrators of this terrorist act, and the families of the victims sued Pan Am for damages arising from the bombing. At the time of the bombing and the beginning of the investigation, Respondent was the Legal Adviser in the United States Department of State. In June 1990, Respondent left the State Department to join the Washington office of the law firm of Hughes Hubbard & Reed (HH&R). In November 1991, two Libyans were indicted by a federal grand jury for the bombing.

In July 1993, Respondent and HH&R were retained to represent Libya in connection with criminal and civil disputes and litigation arising from the Pan Am 103 bomb-

ing. Respondent intended to seek consensual monetary settlements with the families of the victims and negotiate arrangements by which Libya would surrender the two indicted Libyans for trial by the United States and the United Kingdom in a mutually agreeable venue. In mid-July 1993, soon after Respondent's retention by Libya became public, he and HH&R withdrew from the representation, stating that the adverse public and governmental reaction made it impossible to accomplish the purposes for which they were retained.

Shortly thereafter, Bar Counsel initiated an investigation into Respondent's possible violation of District of Columbia Rule of Professional Conduct 1.11(a). This rule prohibits a former government lawyer from representing a party in connection with a matter that is the same as or substantially related to a matter in which the former government lawyer participated personally and substantially while working in the government. On July 25, 1995, Bar Counsel charged Respondent with violating this rule.

Hearing Committee Number One conducted an evidentiary hearing on December 5 and 6, 1995.[1] The Hearing Committee concluded, over the dissent of the public member, that Respondent's representation of Libya constituted a violation of Rule 1.11(a). The Committee recommended that Respondent receive an informal admonition for his misconduct. The Hearing Committee found that "[m]ost of the facts in this case are not in dispute." Hearing Committee Report at 5. What is hotly contested before the Board on Respondent's exception to the Hearing

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[1] "BX" refers to Bar Counsel's Exhibits at the evidentiary hearing; "RX" to Respondent's Exhibits; "I Tr." to the transcript of the hearing before the Hearing Committee on December 5, 1995; and "II Tr." to the transcript of the hearing on December 6, 1995.

Committee's Report is whether these facts prove a violation of Rule 1.11(a). While our analysis does not follow precisely the same path as the Hearing Committee's, it reaches the same conclusion. We adopt the Hearing Committee's very thorough Findings of Fact virtually without change.

II. FINDINGS OF FACT

1. Respondent is a member of the District of Columbia Bar, having been admitted on November 22, 1989.

A. *The Tripoli Bombing*

2. Respondent served as the State Department's Legal Adviser from June 1985 to June 15, 1990. In this position, he was the State Department's chief legal counselor and supervised the activities of the State Department's Office of the Legal Adviser. Respondent and the other attorneys in his office provided legal advice to the Secretary of State and to other officials in the State Department and the United States government.

3. While Respondent was the Legal Adviser, the United States government was grappling with the appropriate response to certain acts of terrorism connected to the Libyan government. These acts included the December 1985 bombings and terrorist attacks of the Rome, Italy, and Vienna, Austria airports. Respondent met periodically with a high-level, interagency group of lawyers to consider legal issues related to the possible use of force against Libya in retaliation for its sponsorship of these terrorist acts. Other lawyers in this group included the Counsel to the President, the Legal Adviser to the National Security Council, the General Counsel of the Central Intelligence Agency, the General Counsel of the Department of Defense, the Legal Counsel to the Chair of the Joint Chiefs of Staff, and the Assistant Attorney Gen-

eral for the Office of Legal Counsel in the Department of Justice.

4. On April 5, 1986, a bomb exploded in a discotheque in Berlin, Germany, killing several United States military personnel. The United States government learned that this bombing was also connected to the Libyan government. As a result, the United States decided to take retaliatory action against Libya. Respondent met with the interagency group of high-level government lawyers to provide legal advice to administration officials on the sufficiency of the evidence linking Libya to the Berlin discotheque bombing, the necessity for the use of force against Libya, the proportionality of the proposed response, and the applicability of the War Powers Resolution to the proposed retaliation.

5. While participating in these discussions, Respondent learned details of communication intercepts linking the Berlin discotheque bombing to Libya. He also learned about passports seized from the Abu-Nidal terrorists who had committed the Rome and Vienna airport bombings, which also connected the terrorists to the Libyan government. Respondent was informed of other possible acts of terrorism that Libya was planning. Finally, Respondent was informed about potential Libyan targets that the United States was considering bombing.

6. On April 15, 1986, the United States government bombed Tripoli, the capital of Libya.

7. Much of the classified information that Respondent learned before the Tripoli bombing about Libyan terrorism was publicly disclosed by the United States government after the bombing. Respondent was not sure in his testimony at the hearing in this matter if all the information he learned was disclosed. He testified that he thought that all of the significant information, but not the way the

intelligence was gathered, was made public. II Tr. 18-19, 40-41; RX 6; RX 74. Respondent himself published an article, cleared by United States government authorities, concerning Libya's terrorist activities. RX 7.

B. *The Pan Am 103 Bombing*

8. On December 21, 1988, Pan Am Flight 103, en route from London, England to New York, New York, was blown apart over Lockerbie, Scotland by a plastic explosive hidden in a radio cassette player placed inside a suitcase on the flight. All 289 persons on board and 11 persons in Lockerbie were killed.

1. *The Investigation*

9. The Pan Am 103 bombing sparked a massive hunt by the United States and the United Kingdom for the perpetrators of this heinous act. As the State Department's Legal Adviser, Respondent received the State Department's daily written briefing report about sensitive or important matters. This classified report was provided to approximately 25 top officials in the State Department. The report periodically contained information about the progress of the United States government's investigation concerning the bombing, which was ongoing during the remainder of Respondent's State Department service. I Tr. 191, 206-07; II Tr. 95-96, 115-16; BX 40; BX 42. Respondent also received oral briefings about matters of interest in the State Department. These briefings were provided by State Department Bureau of Intelligence and Research officials to top State Department officials, including the Secretary of State, the Deputy Secretary, Under-Secretaries, a number of Assistant Secretaries, and the Legal Adviser. Respondent testified that these oral briefings "from time to time" included information about the progress of the Pan Am 103 investigation. II Tr.

42-44, 87-88; BX 40 at 2; BX 42. Between the time of the Pan Am 103 bombing and his departure from the State Department, Respondent also had access to classified communications and cables relating to the progress of the investigation and diplomatic efforts concerning the bombing. BX 25; BX 37; BX 39 at 4. The documents to which he had access remain classified, and Respondent did not have a specific recollection of their exact content beyond information that was published in newspapers at the time of the investigation.

10. While Respondent was the Legal Adviser, the United States government's investigation into the Pan Am 103 bombing focused not on Libya but on two other countries. The United States initially believed the chief suspects in the bombing were the Iranian Revolutionary Guard Corps in Iran or the Popular Front for the Liberation of Palestine in Syria, or both. Iran and Syria were also suspected of supporting these terrorist groups in committing the bombing. Iran was suspected partly because a United States Navy ship had shot down an Iran civilian aircraft over the Gulf of Iran in 1988. I Tr. 207-08; II Tr. 32-33; RX 12. In the classified briefings Respondent received as the Legal Adviser, he was informed of the evidentiary basis for suspecting that one or both of these two entities, and Iran or Syria, had sponsored the Pan Am 103 bombing. II Tr. 46-48; 54-55; II Tr. 205-07; BX 37; BX 39 at 4; RX 61.

11. Sometime after the Pan Am 103 bombing, Respondent participated in a diplomatic exchange with a country other than Libya, "occasioned by the Pan Am 103 bombing," relating to that country's responsibility for terrorist activity generally. BX 39 at 4. Respondent communicated directly with that country to persuade it to stop its terrorist activities. The details of that exchange,

including the country involved, remain classified and were not disclosed at the hearing.

2. *The Pan Am 103 Civil Litigation and Non-Party Subpoenas*

12. In 1989, families of the victims of the Pan Am 103 bombing filed wrongful death lawsuits against Pan Am and other defendants in several federal courts. In April 1989, the federal Judicial Panel on Multidistrict Litigation consolidated for pretrial purposes the federal lawsuits into one proceeding, *In re Air Disaster at Lockerbie, Scotland*, before the United States District Court for the Eastern District of New York (Platt, J.) (hereafter "the Civil Case").

13. On September 27, 1989, Pan Am served non-party subpoenas on the State Department and five other government agencies, seeking documents and the identification of knowledgeable witnesses relating to a theory by Pan Am that the United States government had advance warning of the Pan Am 103 bombing but failed to take adequate steps to prevent it. BX 1; BX 2; BX 3; RX 13.

14. On November 21, 1989, the Justice Department, which represented government agencies on subpoena matters such as this, moved to quash the subpoenas because of its on-going criminal investigation into the bombings. On December 29, 1989, the Justice Department wrote to all six agencies asking for their positions on the disclosure of their documents responsive to the subpoenas. BX 1. The letter pointed out that the Justice Department would respond to the subpoenas on behalf of all six agencies. The letter stated that the Justice Department wanted the agencies' position on disclosure under their "administrative or housekeeping regulations." The letter also noted that all the agencies believed that Pan Am's allegations were unfounded. *Id.*

15. On January 31, 1990, the Justice Department again wrote to the six agencies, providing a report on the status of its motion to quash the subpoenas and describing in detail Pan Am's theory of United States government liability for the bombing. The substance of Pan Am's theory, as described in this letter, was that the United States government, through the CIA, received several specific warnings in the days just before the Pan Am 103 bombing about plans for an explosive to be placed on a Pan Am flight. Allegedly, some of the warnings and tips identified as the target of the attack the specific Pan Am 103 flight that was bombed. BX 2.

16. An attorney in the State Department's Office of the Legal Adviser drafted a memorandum recommending the State Department's response to the subpoena. The draft memorandum was to be transmitted from Respondent, as the Legal Adviser, and Mr. Busby, as the head of the State Department's Office on Counterterrorism, to Edward Perkins, the State Department's Director General, who responds to such subpoenas on behalf of the State Department. The memorandum noted that a search of State Department files revealed approximately 400 documents responsive to Pan Am's request, but many of these documents originated with other agencies and would have to be referred to these agencies for their position on release. The memorandum stated that approximately half of the documents were classified and therefore could not be released under the "state secrets" privilege. The memorandum also reported that the Justice Department would ask for the documents to be withheld if it determined that their production would prejudice the criminal investigation. Finally, the memorandum recommended that Frank Moss, an official in the State Department's Office on Counterterrorism, should be designated as the appropriate State Department witness to testify on the events de-

scribed in the responsive documents. Attached to the memorandum were the Pan Am subpoena and the letters from the Justice Department concerning the subpoena, but the responsive documents were not attached.

17. Respondent read the memorandum, dated January 31, 1990, and its attachments. He did not believe that he saw any of the documents that were responsive to the subpoena. After reviewing the memorandum and attachments, Respondent approved the memorandum by initialing it. The memorandum was also signed by Mr. Busby's deputy on his behalf and sent to Mr. Perkins. I Tr. 33-34, 39-40, 194-95; II Tr. 49; BX 3; BX 41 at ¶ 5.

18. Both Bar Counsel and Respondent advanced much testimony at the hearing relating to whether Respondent's review and approval of this memorandum was, as Respondent claimed, routine and unimportant or, as Bar Counsel argued, substantial and significant. Respondent testified that because he believed Pan Am's allegations were meritless, he did not give much consideration to the contents of the memorandum. He testified that he considered the memorandum to be a routine response to a subpoena request for documents. II Tr. 124-25. He also testified that, as Legal Adviser, he approved "a couple of dozen" memoranda per year dealing with State Department responses to subpoenas, and he perfunctorily approved this one as well. *Id.*; II Tr. 106.

19. Bar Counsel provided evidence, however, that Respondent had instituted a policy that all documents from his office going to an Assistant Secretary or higher official in the State Department had to be reviewed by him, and this memorandum fit into that category. I Tr. 197-98; II Tr. 105-06; BX 41 at ¶ 5; RX 64 at ¶ 12. Respondent

enforced this policy because he wanted to be aware of and involved in advice given by his office to higher-level officials in the State Department. II Tr. 176-80. Respondent also admitted that on rare occasions, he returned a memorandum to his staff when he disagreed with its contents. II Tr. 106. Moreover, while Respondent may have approved dozens of documents dealing with the State Department's responses to subpoenas, this response was lengthier, related to a more complicated third party case, involved more documents than normal, concerned sensitive intelligence matters, and related to a criminal investigation being pursued by the Department of Justice. II Tr. 157, 173-76. Therefore, the Hearing Committee concluded that "Respondent's review and signing of this memorandum constituted the exercise of his discretion to approve the legal advice in the memorandum and was not an insignificant or ministerial act." Hearing Committee Report at 13.

3. *The Meeting with Pan Am and the Busby Consultation*

20. In the fall of 1989 a meeting was held among Secretary of State James Baker, Mr. Busby, and Thomas Plaskett, the Chief Executive Officer of Pan Am. Respondent testified that he did not know whether he attended the meeting, although he knew he was informed about the meeting by Mr. Busby. I Tr. 202-04. *But see* II Tr. 111 ("I did recall the Pan Am theory and I did recall being in a meeting"); BX 39 at 5 ("I do recall, and may have attended [the Baker/Plaskett meeting]"); BX 41 at ¶ 2 ("I did recollect having attended a meeting with representatives of Pan Am"). The purpose of the meeting was for Mr. Plaskett to apprise the Secretary of State about the allegation, discussed above, that the United States government may have had advance warning of the

Pan Am 103 bombing and therefore shared some culpability for it. Respondent was also informed after the meeting that the United States government investigated the allegations raised by Pan Am and believed them to be meritless.

21. When the State Department received Pan Am's non-party subpoena, Mr. Busby asked Respondent if Frank Moss, the State Department official who was designated as the State Department's knowledgeable witness in response to the subpoena, should also be informed about the information in the State Department's possession concerning Pan Am's theories and the Baker/Plaskett meeting. Mr. Busby had told only a limited number of government officials about the substance of the Baker/Plaskett meeting because of the sensitivity of the subject and the on-going investigation into the bombing. But by January 1990, Pan Am's theory had been discounted by the United States government. Respondent learned that the State Department and other government agencies had investigated Pan Am's contentions and believed them to be baseless. Respondent testified that he did not think it would do any harm to notify Mr. Moss about the substance of the Baker/Plaskett meeting. Respondent therefore advised Mr. Busby that Mr. Moss should be informed of the discussions at the meeting.

4. *Subsequent Events in the Pan Am 103 Investigation and Litigation*

a. *Attention Focuses on Libya*

22. Sometime during June 1990, the United States government uncovered information linking Libya to the Pan Am 103 bombing. Investigators determined that the bomb that destroyed Pan Am 103 was activated by a sophisticated electronic timer that had been delivered to

Libyan intelligence officials. This timer was identical to other timers used by Libyan terrorists who had been captured in 1988. Therefore, in June 1990, the United States government began to focus its investigation on Libya.

23. The evidence at the hearing indicates that Respondent did not learn of the new information linking Libya to the Pan Am 103 bombing while he was the Legal Adviser. He left the State Department to join HH&R on June 15, 1990. Although it is unclear exactly when in June 1990 the United States learned of the new evidence pointing to Libya, the Hearing Committee found that "Respondent testified forcefully and credibly that he did not know about it while at the State Department. He said he learned about the evidence in November 1991, after he had left the State Department, when the indictment of two Libyans for the bombing was announced." Hearing Committee Report at 16. Respondent's testimony was supported by an artcle he wrote for *The Washington Post* in July 1990, which suggested that Iran was responsible for the Pan Am 103 bombing. RX 9.

b. *The Civil Case*

24. On December 12, 1990, the United States District Court overseeing the Pan Am 103 Civil Case granted the Justice Department's motion to quash Pan Am's non-party subpoenas, including the subpoena to the State Department that was the subject of Respondent's January 31, 1990, memorandum. Pan Am then filed a motion for leave to implead the United States as a third-party defendant. On December 17, 1990, the United States opposed Pan Am's motion, and on April 24, 1992, the court rejected Pan Am's attempt to implead the United States and refused to permit an action to proceed against the United States. On July 10, 1992, after an eleven-week jury trial, the plaintiffs in the Civil Case won a judgment

holding that Pan Am had engaged in willful misconduct that was a substantial factor in causing the bombing. The amount of the damages was not decided. *See In re Air Disaster at Lockerbie, Scotland*, 811 F. Supp. 89, 90 (E.D.N.Y. 1993). Subsequently, damages were decided for three passenger plaintiffs. *Id.*

c. *The Criminal Case*

25. As noted above, on November 13, 1991, the United States indicted two Libyans for planting the bomb that destroyed Pan Am 103. The indictments were returned in the United States District Court for the District of Columbia (*United States v. Ali Al Megrahi*) (hereafter, the "Criminal Case").

26. On November 24, 1991, the United States and the United Kingdom proposed a joint declaration for United Nations approval, calling for the Libyan government to surrender the two indicted Libyans for trial, to disclose all it knew about the bombing, and to pay appropriate compensation for the bombing. On January 21, 1992, the United Nations Security Council adopted a resolution condemning the bombing and urging Libya to cooperate fully in establishing responsibility for the bombing. On March 31, 1992, because Libya did not respond to the United Nations demand, the United Nations called for the imposition of sanctions on Libya.

C. *Respondent and HH&R Seek to Represent Libya*

27. On June 15, 1990, Respondent left the State Department to become a partner in the Washington office of HH&R.

1. *Negotiations with Libya*

28. In late 1992, Graham Wisner, a Washington, D.C. lawyer who knew Respondent, asked Respondent if he

was interested in assisting Wisner in representing Libya in connection with legal proceedings in the United States arising from the Pan Am 103 bombing. Respondent replied that he would not defend Libya for anything it had done, but if Libya was looking for a way to satisfy its obligations under the United Nations resolutions, he would be interested in representing Libya for that purpose. I Tr. 210-13.

29. Wisner told Respondent that the Libyans were interested in having Respondent write a proposal concerning his potential representation of Libya. I Tr. 218. Respondent drafted a letter, dated January 7, 1993, proposing a representation of Libya "in connection with on-going civil and criminal disputes and litigation relating to the destruction of Pan Am 103." BX 7 at 1; I Tr. 218. The letter, addressed "To Whom it May Concern," stated that HH&R was prepared to assist "in resolving by consensual negotiations all pending and potential civil and criminal litigations and other legal proceedings" relating to the Pan Am 103 bombing. BX 7 at 1. HH&R proposed to commence work on this representation when Libya placed a retainer of $3 million into HH&R's escrow account in a Swiss bank, payable to HH&R for its work at the rate of $250,000 a month. *Id.*

30. Respondent delivered this proposal to Wisner, who gave it to "intermediaries" of the Libyan government. I Tr. 218. Respondent also met twice with representatives of the Libyan government in Geneva to discuss the proposed representation. I Tr. 219, 250-51; II Tr. 97-98.

2. *The Representation Agreement*

31. On April 14, 1993, Respondent and a representative of the Libyan government signed two letters, similar in terms to the January 7 letter, that established the agree-

ment by which Respondent and HH&R would represent Libya in connection with civil and criminal litigation relating to the Pan Am 103 bombing. The letters were addressed to "The Committee for the Case of Lockerbie." This committee acted on behalf of the Libyan government and consisted of the Libyan Ambassador to Morocco, the Libyan Ambassador to Tunisia, the Libyan Minister of Foreign Affairs, and the Libyan Chief of Foreign Security. RX 4; BX 10; II Tr. 78-81.

32. The terms of the April 14 representation agreement specified that HH&R:

> would represent you [*sic*] committee in connection with on-going civil and criminal disputes and litigation relating to the destruction of Pan Am 103. . . . We are prepared to assist the relevant parties regarding the above incident by investigating the facts and legal proceedings, preparing legal analyses, providing legal advice and proposing legal steps to deal with this matter. Our efforts will not include substantial activities as litigators but rather would be limited to activities associated with agreed upon measures, including consensual dispositions. Measures will be taken only with your prior consent, and without admission of liability.

BX 10 at 1. The letter went on to point out that "[o]ur firm has excellent litigators, including former prosecutors, former State officials, and lawyers familiar with aircraft litigation, upon all of whose talents we would draw as necessary." *Id.* at 2. The agreement also stated that HH&R was unwilling to engage in any activities that would require it to register under the Foreign Agents Registration Act (FARA). *Id.* at 1. This meant that HH&R would limit its activities to legal work rather than any lobbying on behalf of Libya.

33. The financial terms of the agreement specified that Libya would deposit a $3 million retainer into a mutually agreeable Swiss bank account for one year's work by HH&R. The retainer would be disbursed to HH&R at the rate of $250,000 a month. The representation would begin when the Libyans provided a letter of credit to HH&R's Swiss bank account ensuring payment of the agreed-upon fees and when HH&R confirmed that it had obtained a license from the Treasury Department's Office of Foreign Assets Control (OFAC) permitting HH&R to receive payments from Libya legally. *Id.;* I Tr. 219-20.

34. Respondent testified that the two specific objectives of the representation were: 1) to attempt to resolve the extradition request for the two indicted Libyans in a manner acceptable to the United States, the United Kingdom, and the Libyan government; and 2) to seek consensual settlements of the civil litigation arising from the Pan Am 103 bombing in a manner satisfactory to the plaintiffs, their counsel, the court, and the Libyans. I Tr. 213-19; BX 12A; BX 27. Another lawyer at HH&R, Mr. Gerson, described Respondent's contemplated role as "Kissingerian"—achieving a "grand scale" settlement providing compensation to families of the victims in fulfillment of the United Nations resolutions.

35. Respondent testified that "acting as Libya's lawyer" he intended to work out an arrangement with the Department of Justice to have the two indicted Libyans produced to an acceptable venue for trial. I Tr. 217; II Tr. 62-63. Respondent thought that the Libyans, the United States, and the United Kingdom might agree that the trial of the Libyans could proceed in a forum other than the United States, such as Scotland. II Tr. 62-63; II Tr. 261. Respondent stated that he specifically declined to represent the two indicted Libyans in the defense of their criminal case or to represent Libya in defending

itself in connection with the bombing. I Tr. 93-95, 217-18; BX 27.

36. Respondent also testified that he contemplated Libya making an *ex gratia* payment to the families of the victims of the bombing, that is, a payment by Libya without any admission of fault. I Tr. 214-18; II Tr. 63-64. While Respondent was Legal Adviser, he had successfully obtained *ex gratia* payments from Iraq for the families of the servicemen killed or injured on the *USS Stark*, a United States Navy ship that had been attacked by an Iraqi aircraft. I Tr. 183-85; RX 74 at ¶ 5. Respondent described the *ex gratia* payment by Iraq in the Stark case:

> You accept the responsibility to pay for the damage without saying that you were liable in a tech—you know, like Iraq did in Stark. Iraq said this was a mistake, we didn't—we wouldn't be—we wouldn't be responsible, *if you had a trial, you wouldn't be able to find us responsible, but we're paying you anyway*; accept responsibility in that sense at least, yes.

I Tr. 214 (emphasis added).

37. Respondent had in mind a figure of $1 billion as an appropriate *ex gratia* payment from Libya for the Pan Am 103 bombing. II Tr. 63-64. Although Libya was not a party to the Civil Case, Respondent thought that the Civil Case could be a "possible vehicle" for making payments to the families of the victims. II Tr. 64-65. Respondent also knew that Pan Am would seek damages from Libya from the proposed *ex gratia* payment, but Respondent was not contemplating that Libya would agree to make any such payment to Pan Am. II Tr. 64.

BEST AVAIL

D. *Preparations to Represent Libya*

1. *The OFAC License*

38. In preparation for their representation of Libya, Respondent and HH&R took several steps. First, they attempted to obtain the required OFAC license. OFAC administers the economic sanctions imposed on foreign countries by the United States, including 1986 sanctions on Libya. Under those sanctions, any economic transaction with Libya was prohibited unless OFAC granted a specific license to engage in the transaction or the transaction was authorized by a general license because it fit within a general category of acceptable transactions. Providing legal advice to Libya on the United States legal system was covered by a general license. Receiving payments from Libya for legal services required a specific license.

39. On March 11, 1993, an attorney at HH&R spoke to Richard Newcomb, the director of OFAC, regarding HH&R's possible representation of Libya. Newcomb stated that "lobbying" to settle the Civil Case would not fall within OFAC's general exception for legal services. Because the exact scope of HH&R's Libyan representation was not clear at the time, Newcomb suggested that HH&R provide a written description of what it intended to do for Libya. BX 8.

40. On April 19, 1993, after Respondent and the Libyan representative signed the representation agreements described in paragraphs 31-33 above, an HH&R attorney advised OFAC in writing that HH&R would be providing "[l]egal representation to the Government of Libya in connection with [the Criminal Case and the Civil Case]." BX 11. Respondent and HH&R believed that it could provide such legal services under a general

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license, but that they needed a specific license to be paid by Libya for their services. HH&R's letter therefore requested a specific license for receipt of payments from Libya for legal services. BX 11.

41. On May 10, 1993, OFAC issued a specific license to HH&R to receive payments of fees and expenses in connection with the Criminal Case, the Civil Case, and any other United States court cases relevant to the Pan Am 103 litigation. OFAC also required HH&R to file a copy of the specific license with "the court." BX 12.

2. *Ethical Issues Facing HH&R*

a. *Mr. Gerson Withdraws From HH&R*

42. Respondent and HH&R were aware of an ethical issue related to their proposed representation of Libya because another attorney at HH&R, Allan Gerson, represented a plaintiff who was seeking compensation from Libya for the Pan Am 103 bombing. I Tr. 237-39. Mr. Gerson, a law professor on leave from his university, had been working at HH&R in an "of counsel" capacity since January 1991. On July 1, 1992, Mr. Gerson had written an article in *The New York Times* proposing adoption of a United Nations resolution establishing an international claims commission to administer compensation by Libya for the families of the Pan Am 103 victims. As a result of his article, two men whose relatives were killed in the bombing, Bruce Smith and Paul Hudson, retained Mr. Gerson and HH&R to seek compensation from Libya through the establishment of the United Nations commission. By early 1993, Mr. Gerson began contemplating suing Libya in the United Kingdom on behalf of his clients.

43. On January 4, 1993, Respondent told Mr. Gerson that Respondent and HH&R were considering representing

Libya in connection with the Pan Am 103 bombing. Respondent informed Mr. Gerson that they should not discuss Mr. Gerson's representation of the Pan Am 103 plaintiffs because Mr. Gerson "might be on the other side" if Respondent were retained by Libya. I Tr. 111-12. Respondent believed that it would have been an ethical conflict for him and HH&R to represent Libya with regard to payment of compensation to the relatives of the victims while at the same time another HH&R lawyer was considering a lawsuit against Libya on behalf of the relatives of the victims. I Tr. 237-38; BX 39 at 2. Charles Scherer, the managing partner of HH&R, agreed that this situation raised a conflict under the District of Columbia ethics rules. II Tr. 235-36.

44. On March 24, 1993, Mr. Scherer and Robert Sisk, the chairman and senior litigating partner of HH&R informed Mr. Gerson that an ethical conflict was developing because of HH&R's impending representation of Libya. Mr. Scherer testified that Mr. Gerson was told that he would have to leave HH&R if it were retained by Libya. II Tr. 235. Mr. Gerson testified that he understood that if the firm agreed to represent Libya, he would either have to withdraw from representing the Pan Am plaintiffs or leave the firm.

45. On April 16, 1993, after the representation agreements between Libya and HH&R were signed, Mr. Gerson wrote a letter to HH&R announcing his intention to withdraw from his position with the firm and return to teaching full-time. BX 10A. This letter confirmed that Mr. Gerson was continuing his representation of Mr. Smith, one of the Pan Am plaintiffs; Mr. Gerson no longer represented the other plaintiff, Mr. Hudson. Mr. Smith subsequently signed a letter terminating any relationship between himself and HH&R, confirming that he wanted to

be represented by Mr. Gerson, and consenting to HH&R's representation of Libya. RX 35.

b. *Rule of Professional Conduct 1.11(a)*

46. John Townsend, the managing partner of the Washington office of HH&R, assisted in HH&R's preparation to represent Libya. HH&R had a firm-wide ethics committee, and a Washington HH&R partner, Bill Stein, was a member of that committee. Mr. Townsend consulted with Mr. Stein concerning the ethical rules applicable to HH&R's proposed representation of Libya. According to Mr. Townsend, sometime after HH&R and Respondent agreed in April 1993 to represent Libya, Respondent asked Mr. Townsend for a copy of any ethics rule applicable to the proposed representation. Mr. Townsend consulted with Mr. Stein, who said that Respondent should keep in mind Rule 1.11 as well as Rule 1.9.[2] Respondent was given a copy of both rules. II Tr. 252-59.

47. Respondent testified at the hearing that he did not specifically recall discussing Rule 1.11 with Mr. Townsend, Mr. Stein, or anyone outside the firm to determine whether this rule prevented Respondent from representing Libya. Respondent said, however, that the issue "certainly came up." II Tr. 116-22, 268-70. He testified that he consulted with members of the firm about the ethics issues surrounding the proposed representation of Libya, but he did not "systematically" address whether his prior service as the Legal Adviser precluded his representation of Libya under Rule 1.11. Respondent testified that much more important to him was the question whether he had learned

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[2] Rule of Professional Conduct 1.9 prohibits a lawyer who formerly represented a client in a matter from representing another person in the same or a substantially related matter if the person's interests are materially adverse to the former client, unless the former client consents.

any "confidential information" as Legal Adviser that might have to be revealed during his representation of Libya, and because he believed he had not learned such information, he "thought [Rule 1.11] was clearly inapplicable" to his representation of Libya. II Tr. 109, 118-21. Respondent said he did not think that Rule 1.11 was "a major issue" or a "real issue" concerning his proposed representation. II Tr. 120-21.

48. Respondent did not consult with the State Department before undertaking the Libyan representation to determine if it had any objection to his representing Libya. He also did not check with the State Department to determine whether he had worked on any matters while in the government that arguably could be considered substantially related to his representation of Libya. II Tr. 83. Respondent said he refrained from doing so before the representation began because he knew his representation of Libya would create a "bombshell," and he was not confident that Libya would follow through with its intent to hire him. Libya had courted other lawyers in the past but had not retained them. Moreover, according to Respondent, he believed that the limitation he placed on the scope of the representation—seeking consensual resolutions only and not helping Libya avoid liability—made everything he learned at the State Department irrelevant, since he was proceeding on the assumption that Libya was responsible for the bombing.

49. HH&R did take action to "wall off" Peter Flory, a law clerk at the firm, from any involvement in the Libyan representation. From January 1992 to January 1993, Flory had served as the Associate Coordinator in the State Department's Office on Counterterrorism. This office helped coordinate the work of federal agencies, including the FBI and the Justice Department, in connec-

tion with counterterrorism issues worldwide. According to Mr. Flory, the Office on Counterterrorism was the lead office in developing United States policy with regard to the bombing of Pan Am 103. During the time Mr. Flory worked in that office, he was involved in deliberations regarding the Pan Am 103 bombing, working directly in support of the development and implementation of U.S. diplomatic and other policy with regard to Libya's sponsorship of the attack. Because Mr. Flory had been privy to classified and confidential information connecting Libya to the bombing, HH&R decided he should not be involved in the firm's representation of Libya. According to Mr. Townsend, the managing partner of HH&R's Washington office, he asked Mr. Flory to send a letter to the State Department confirming that he would not be involved in HH&R's representation of Libya "so that there would be no question of concern at State that any classified information that was lurking in Peter [Flory's] mind was being applied to this representation." II Tr. 257-58.

E. *The Representation of Libya Begins*

50. On June 24, 1993, HH&R received a letter of credit from Bank Credit Suisse for $2.5 million, ensuring payment of Libya's legal fees. BX 14. On June 30, 1993, HH&R sent a statement billing Libya $250,000 for professional "services and advice" to be performed by Respondent and HH&R for Libya during the month of July 1993. BX 15.

51. On July 1, 1993, HH&R received $250,000 in its Geneva bank account from Libya. Respondent and HH&R considered its representation of Libya to begin on July 1.

52. Respondent and HH&R took several initial steps as part of its representation of Libya. Various research projects were assigned to HH&R attorneys, such as com-

piling docket entries in the Pan Am 103 Civil Case, collecting reported decisions arising from litigation relating to the bombing, surveying United States practice regarding trials of international fugitives, surveying relevant treaties between the United States and Libya, and researching procedures for filing an OFAC license with a court. Respondent and other HH&R lawyers also met to discuss possible approaches to the resolution of the Criminal and Civil Cases. In addition, Respondent wrote to a member of the Libyan committee to request relevant documents from Libya.

53. Although HH&R had obtained a specific license from OFAC to receive payments for its legal services, there was still some question whether HH&R's contemplated legal representation exceeded the services permitted under OFAC's general license. Moreover, HH&R was concerned about having to file the specific license with the court overseeing the Civil Case, as required by the license. Libya was not a named party in the Civil Case, and HH&R thought that filing the specific license with the court might be construed as waiving the sovereign immunity of Libya from a lawsuit in the United States. As a result, on July 1, 1993, HH&R wrote to OFAC requesting a meeting to discuss the terms of the OFAC license. BX 16.

54. On July 12, 1993, HH&R issued a press release announcing that it had "been retained by the Government of Libya to assist it in seeking a consensual resolution of litigation arising from the Pan Am 103 disaster." BX 19. The release quoted Respondent as stating: "This retention does not mean that Libya or either individual defendant has decided to appear in the criminal or civil cases. Hughes Hubbard & Reed will advise the Government of Libya with a view to developing solutions for the differences which exist in these litigations, and which are

acceptable to all parties; we will not litigate actively in defense of Libya or the individual defendants." *Id.*

55. The release provoked extremely negative public reaction, including an editorial on July 14 in *The Washington Post* comparing Respondent's representation of Libya to the movie "Indecent Proposal." BX 20; BX 24. On July 14, in response to media inquiries, a State Department spokesperson stated that the State Department would not comment on whether Respondent's representation of Libya created a conflict of interest.

56. On July 15, 1993, Respondent and another HH&R lawyer met with the Director of OFAC and other OFAC officials. The OFAC officials advised Respondent that a general OFAC license permitted HH&R to provide Libya with legal advice and to represent Libya concerning potential extradition of the two indicted Libyans. Because Libya was not a party to any proceeding in the United States, the general license did not permit HH&R to pursue settlement negotiations on behalf of Libya. A specific license was needed for that purpose. Respondent testified that he stated at the meeting that he intended to contact the lawyer representing the families of the victims about the possibility of commencing settlement negotiations, and if that process looked like it was going to proceed, he would apply for another specific license as required by OFAC. On July 15, 1993, Respondent wrote to a lawyer for the Pan Am plaintiffs to describe Respondent's role in representing Libya.

57. Also on July 15, 1993, Respondent wrote to the State Department's Legal Adviser, Conrad Harper, expressing displeasure with the statement attributed to the State Department official concerning Respondent's representation of Libya. Respondent's letter to Mr. Harper described the proposed scope of his and HH&R's represen-

tation of Libya and stated that Respondent did not see any legal or ethical impediment to it. The letter asked for the State Department's appraisal of this position. BX 25. Later that day, after his meeting with OFAC officials, Respondent wrote to Mr. Harper again to clarify the nature of HH&R's representation of Libya and to ask for a prompt reply about the propriety of the representation. BX 27.

F. *Respondent and HH&R Withdraw from Representing Libya*

58. On July 16, 1993, Respondent and HH&R withdrew from representing Libya. They issued a press release announcing the withdrawal and stating that the public perception of HH&R's undertaking and the reaction of government authorities were so negative that HH&R concluded that it could not effectively carry out the representation. Respondent testified that the public reaction and the inaccurate portrayal that HH&R was trying "to get Libya off the hook" had caused the families of the victims to react unfavorably. In addition to the families' reaction, a hostile response from United States government officials, including Senators and State Department officials, made Respondent and HH&R conclude they could not reach consensual resolutions of the Civil and Criminal Cases and therefore should withdraw. Respondent stated that he and HH&R withdrew because "we didn't think we'd be able to do the job effectively." II Tr. 122.

59. HH&R subsequently applied to OFAC for a specific license to return the $250,000 payment it had received from Libya for services rendered during July 1993. That license was granted, and HH&R returned the $250,000 to Libya.

G. *Investigations into Respondent's Conduct*

60. In response to a request from United States Senator Carl Levin, the Office of Government Ethics (OGE) reviewed whether Respondent's conduct violated any applicable post-employment restrictions on government employees, including 18 U.S.C. § 207. This statute prohibits a former federal government employee from communicating or appearing before a federal government agency, with the intent to influence the government, in connection with a particular matter in which the former official participated personally and substantially when in the government. OGE concluded that because Respondent had not yet contacted any government officials with the intent to influence them in connection with his Libyan representation, he had not violated this statute. OGE made no judgment on the hypothetical question whether Respondent would have violated the law if he had continued the representation and made substantive communications to executive branch officials on behalf of Libya. BX 46.

61. The United States Attorney's Office for the District of Columbia also investigated the circumstances surrounding HH&R's application for an OFAC license but closed its investigation without bringing any charges.

62. On July 22, 1993, as a result of his review of press articles about Respondent's representation of Libya, Bar Counsel began an investigation into Respondent's conduct. Bar Counsel sent Respondent a letter asking for his response to the allegation that his representation of Libya may have violated the District of Columbia Rules of Professional Conduct, particularly Rule 1.11(a).

3. In response to these investigations, on August 18, 1993, Respondent's counsel sent to the State Department a draft of two paragraphs describing Respondent's recol-

lection of the matters on which he worked while the Legal Adviser that related to the Pan Am 103 bombing. Respondent's counsel asked whether these recollections were accurate. BX 37. According to this submission, Respondent recalled his diplomatic exchange with the country other than Libya and recalled that he either attended or knew about the Baker/Plaskett meeting. *Id.* On August 20, 1993, the State Department's Legal Adviser, Mr. Harper, responded that the State Department was not in a position to verify the accuracy of Respondent's submission. Mr. Harper noted, however, that Respondent had signed the January 31, 1990, memorandum concerning the State Department's response to Pan Am's non-party subpoena. BX 38. Respondent testified that he had forgotten about that memorandum until Mr. Harper's letter reminded him of it. I Tr. 198-99; II Tr. 110-11; BX 41.

H. *The Disciplinary Proceedings*

64. Bar Counsel and Respondent agreed to a diversion agreement in April 1995, which was rejected by the Board Chair on May 1, 1995. Respondent rejected an informal admonition offered by Bar Counsel, so Bar Counsel petitioned the matter and brought it to a hearing.

65. Hearing Committee Number One held a two-day evidentiary hearing on December 5 and 6, 1995. Bar Counsel and Respondent were given the opportunity to submit briefs, and to address specific legal issues posed by the Committee concerning the interpretation of Rule 1.11(a).

66. In a Report and Recommendation dated October 22, 1996, Hearing Committee One concluded after a thorough analysis of the facts and the law that "Respondent did participate personally and substantially while at the State Department in the response to the Pan Am 103

bombing, including the government's investigation and the establishment of liability for it. [The Committee further] conclude[d] that this matter was substantially related to his later representation of Libya and therefore Respondent violated Rule 1.11(a)." Hearing Committee Report at 51. The Committee recommended an informal admonition as the appropriate sanction for Respondent's misconduct. Hearing Committee Report at 70-72.

67. The public member of Hearing Committee One dissented, because she disagreed that Respondent obtained confidential information in his capacity as Legal Adviser that could have been useful in his subsequent representation of Libya, given the limits on Respondent's representation and the lack of any real doubt by July 1, 1993 as to whether Libya was responsible for the Pan Am 103 tragedy.

68. This matter is before the Board on Respondent's exception to the Hearing Committee's Report and Recommendation.

III. DISCUSSION CONCERNING VIOLATION

A. *Conduct Prohibited by Rule 1.11(a).*

Rule 1.11(a) states in pertinent part:

> A lawyer shall not accept other employment in connection with a matter which is the same as, or substantially related to, a matter in which the lawyer participated personally and substantially as a public officer or employee.

Therefore, the essential elements to show a violation of Rule 1.11(a) are:

(1) a government lawyer

(a) participates as a public employee in a matter,

(b) both personally and substantially;

(2) followed by the lawyer's leaving the government and accepting employment in another matter that is

(a) the same as, or

(b) substantially related to the original matter.

We outline first the definitions and case authority available to us in construing the Rule. We then apply these provisions to Respondent's conduct, taking into account the arguments made by Respondent and Bar Counsel.

1. *What is a "matter" for purposes of Rule 1.11(a)?*

The definition of "matter" for purposes of Rule 1.11(a) is crucial for an analysis of whether any "matter" in which Respondent participated as Legal Adviser is the same as, or substantially related to, the representation of Libya he undertook at HH&R. At all times relevant to Respondent's conduct,[3] Rule 1.11(g) defined "matter" as: "[A]ny judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties." Comment [3] to Rule 1.11 explains that "[t]he making of rules of general applicability and the establishment of general policy will ordinarily not be a 'matter' within the meaning of Rule 1.11."

The District of Columbia Court of Appeals has not been presented with a case requiring interpretation of the word "matter" in the context of Rule 1.11(a) since the

[3] Rule 1.11(g) since has been amended so as not to include a separate definition of "matter." In the current Rules, "matter" is defined generally in the Terminology section, but is required by Rule 1.11(g) to involve "a specific party or parties."

Rules became effective on Janary 1, 1991. The leading case interpreting predecessor DR 9-101(b), *Brown v. District of Columbia Zoning Adjustment*, 486 A.2d 37 (D.C. 1984) (*en banc*), noted with approval the characterization of "matter" by the American Bar Association's Committee on Professional Ethics and Grievances, which described a matter as " 'a discrete and isolatable transaction *or set of transactions* between identifiable parties.' " 486 A.2d at 42 n.4 (emphasis in original), quoting *Committee for Washington's Riverfront Parks v. Thompson*, 451 A.2d 1177, 1188 (D.C. 1982). In *Committee for Washington's Riverfront Parks*, 451 A.2d at 1188, the Court quoted at length the description of "matter" by the ABA Committee:

> Although a precise definition of "matter" as used in the Disciplinary Rule is difficult to formulate, the term seems to contemplate a discrete and isolatable transaction or set of transactions between identifiable parties. Perhaps the scope of the term "matter" may be indicated by examples. The same lawsuit or litigation is the same matter. The same issue of fact involving the same parties and the same situation or conduct is the same matter. By contrast, work as a government employee in drafting, enforcing or interpreting government or agency procedures, regulations, or laws, or in briefing abstract principles of law, does not disqualify the lawyer under DR 9-101(b) from subsequent private employment involving the same regulations, procedures, or points of law; the same "matter" is not involved because there is lacking the discrete, identifiable transactions or conduct involving a particular situation and specific parties. [(ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 at 6 (1975) (footnotes omitted).]

2. *What is participation in a matter "personally and substantially as a public officer or employee"?*

The second essential element necessary for Bar Counsel to show a violation of Rule 1.11(a) is that the government lawyer must have participated in the government matter "personally and substantially." The Comments to Rule 1.11 do not address personal and substantial participation, and no definition of this term is provided. No District of Columbia case interprets the meaning of personal and substantial participation in the context of a disciplinary proceeding. The regulations implementing 18 U.S.C. § 207 provide some insight on this issue, although in the distinct context of guiding interpretation of a criminal statute banning conflict of interest by government employees:

> "Substantially," means that the employee's involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue.

5 C.F.R. § 2637.201(d)(1). However, "the single act of approving or participation in a critical step may be substantial," if the act is of significance to the matter. *Id.*

In an opinion interpreting DR 9-101, the D.C. Bar Legal Ethics Committee opined that a government lawyer's participation in a matter was personal and substantial because it was "direct, extensive, and substantive, not peripheral, clerical, or formal." Opinion No. 84 (1980).

3. *What is a "substantially related" matter?*

The third essential element for a violation of Rule 1.11(a) is that the matter in which the government law-

yer participated must be "substantially related" to the subsequent matter in which he or she represents the private client. The methodology for determining whether two matters are "substantially related" in the revolving-door context, under DR 9-101(b), was the subject of extended analysis by the *en banc* Court in *Brown*. *Brown* concerned whether counsel for a private real estate developer should be disqualified in a Board of Zoning Adjustment proceeding where the counsel previously had been counsel for the District of Columbia in two earlier transactions relating to the same piece of real estate. 486 A.2d at 40. In *Brown*, the Court noted that the substantial relationship test originated in litigation between private parties in the context of a motion to disqualify counsel on the grounds that a lawyer had unethically switched sides between private litigants. 486 A.2d at 42. The Court cited *T.C. Theatre Corp. v. Warner Brothers Pictures, Inc.*, 113 F. Supp. 265, 268-69 (S.D.N.Y. 1953), *aff'd*, 216 F.2d 920 (2d Cir. 1954), a case in which the central purpose of the ethical prohibition against side-switching was described as preventing a private lawyer who may have received confidential information from using it against the client in a subsequent representation.

The Court described the test that was generally used to determine if two matters were substantially related in private side-switching cases:

> "Initially, the trial judge must make a factual reconstruction of the scope of the prior legal representation." If the factual contexts overlap, the court then has to determine "whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those [prior] matters." Finally, if such information apparently was available to counsel in the prior representation, the court has to determine whether it

> "is relevant to the issues raised in the litigation pending against the former client." If all three conditions are met, the matters will be substantially related and thus deemed the same for conflict of interest purposes, with doubts to "be resolved in favor of disqualification."

Id. at 49 (citations and footnotes omitted) (quoting *Westinghouse Electric Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 225 (7th Cir. 1978)).

The *Brown* Court then examined the revolving-door situation, in which a lawyer leaves the government to enter private practice. The Court concluded that the revolving-door rule, like the side-switching rule, was designed to address at least a reasonable possibility that some specifically identifiable impropriety would occur. 486 A.2d at 49. The Court emphasized that the critical issue was whether the attorney had the opportunity while participating in a matter in the government to gather specific information that the attorney could not otherwise have gained and that could be used on behalf of a private client in a later proceeding. The information of concern was not general data, or general agency expertise and contacts, but specific information. *Id.* at 48-49.

The *Brown* Court concluded that the *Westinghouse* private side-switching test should be broadened in a government revolving-door case for several reasons. First, because government attorneys may have had access to more kinds of information than private attorneys typically do, there is a greater potential for misuse of government information in the revolving-door situation. Second, the public generally is more concerned about government improprieties than private improprieties, and the appearance problem is more severe because the public is likely to be more critical of the potential abuse of information by a

government lawyer entering private practice. Third, the complainant in a revolving-door situation may not have specific knowledge of the information gathered by the government lawyer. *Id.* at 48.

As a result, the Court in *Brown* articulated a broad test for determining whether a substantial relationship exists between two matters in revolving-door cases:

> Accordingly, in cases where the complainant's evidence shows that the factual contexts of the two (or more) transactions overlap in such a way that a reasonable person could infer that the former government attorney may have had access to information legally relevant to, or otherwise useful in, the subsequent representation, we conclude that the complainant will have established a prima facie showing that the transactions are substantially related. The burden of producing evidence that no ethical impropriety has occurred will then shift to the former government attorney, who must rebut complainant's showing by demonstrating that he or she could not have gained access to information during the first representation that might be useful in the later representation. Absent sufficient rebuttal, the complainant will have carried the burden of persuasion as the moving party.

486 A.2d at 49-50 (footnotes omitted).

The Court in *Brown* stressed that it would not be adequate rebuttal for the former government lawyer to state that no useful information was in fact received during the government representation. The Court declared that if it was reasonable to infer that the lawyer may have received useful information during the government representation, there would be a conclusive inference that useful information was in fact received. 486 A.2d at 50. The law-

yer's rebuttal case had to focus instead on the scope of the representation involved in each matter and not the actual receipt of information:

> To rebut a complainant's prima facie showing of substantial relationship, the former government attorney must produce evidence elaborating on the nature of the two matters so as to make it "clearly discernible" that the issues involved are unrelated and the court should not infer the existence of useful government-developed information.

Id. at 50 n.18 (quoting *Westinghouse Electric Corp.*, 588 F.2d at 224).

The Court also made clear that it would not inquire into the specific information or confidences disclosed during the government representation, or whether that information was used by the former government lawyer in private practice. The Court noted that it would not require proof that an attorney actually had access to or received privileged information in the prior case. "Only in this manner can the lawyer's duty of absolute fidelity be enforced and the spirit of the rule relating to privileged communications be maintained." *Brown*, 486 A.2d at 42 n.5 (quoting *T.C. Theatre Corp.*, 113 F. Supp. at 268-69).

While the Court in *Brown* set out a methodology for determining when matters are substantially related that is designed to give wide scope to the protection of the public, it made clear by its exacting analysis of the facts that it would take care in applying that test to each case, so that private employment following government service would not be unduly constrained. In *Brown*, the two lawyers involved, while previously at the D.C. Office of Corporation Counsel, had worked on two transactions involving the property: the developer's attempt to increase the height limitation on the property and the developer's at-

tempt to mix residential and commercial uses on the property. When the two lawyers left the government, they were retained by the same developer to handle another zoning issue involving the same property: the developer's application for a special zoning exception to increase the number of below-grade parking spaces permitted on the property. 486 A.2d at 40-41.

In deciding a motion to disqualify the two lawyers from representing the developer in the BZA proceeding involving the parking spaces, the Court applied the methodology described above to determine whether the matters were substantially related. The Court concluded that the lawyers could not have gained any information in the earlier proceedings that would have aided them in their subsequent representation, and therefore the matters were not substantially related. *Id.* at 53, 58-59. The Court looked beyond the surface facts that the developer and property were the same, to the issues involved in the various representations, in reaching that conclusion.

When the District of Columbia Court of Appeals adopted the Rules of Professional Conduct in 1991, it also adopted the Comments to the Rules. *See* Preface to Rules of Professional Conduct (adopting Rules *and* Comments). Comment 4 to Rule 1.11 contains an explicit description of the *Brown* methodology for analyzing the substantial relationship element of Rule 1.11(a):

> The leading case defining "substantially related" matters in the context of former government employment is *Brown v. District of Columbia Board of Zoning Adjustment*, 486 A.2d 37 (D.C. 1984) (en banc). There the D.C. Court of Appeals, en banc, held that in the "revolving door" context, a showing that a reasonable person could infer that, through

participation in one matter as a public officer or employee, the former government lawyer "may have had access to information legally relevant to, or otherwise useful in" a subsequent representation, is prima facie evidence that the two matters are substantially related. If this prima facie showing is made, the former government lawyer must disprove any ethical impropriety by showing that the lawyer "could not have gained access to information during the first representation that might be useful in the later representation." *Id.* at 49-50. In *Brown* the Court of Appeals announced the "substantially related" test after concluding that, under former DR 9-101(B), *see* "Revolving Door," 445 A.2d 615 (D.C. 1982) (en banc) (per curiam), the term "matter" was intended to embrace all matters "substantially related" to one another—a test that originated in "side switching" litigation between private parties. *See* Rule 1.9, Comment [2]; *Brown*, 486 A.2d at 39-40 n.1, 41-42 & n.4. Accordingly, the words "or substantially related to" in paragraph (a) are an express statement of the judicial gloss in *Brown* interpreting "matter."

B. *Did Respondent Violate Rule 1.11(a)?*

1. *What was the "matter" involved in Respondent's service as Legal Adviser that is potentially the same, or substantially the same, as his later representation of Libya in private practice?*

The Hearing Committee considered two possible "matters" offered by Bar Counsel in which Respondent was involved while he was Legal Adviser: "1) the United States government's 1986 decision to bomb Tripoli in retaliation for Libyan terrorism; and 2) the establishment of culpability for the 1988 Pan Am 103 bombing, includ-

ing the government's investigation and the ensuing litigation concerning the bombing." Hearing Committee Report at 46. The Hearing Committee concluded that Bar Counsel had not carried his burden of proving that the first of the matters was substantially related to Respondent's representation of Libya, because it was not part of the same transaction or set of transactions as the later act of terrorism, the bombing of Pan Am 103. *Id.* at 46-47, 49-50. In essence, the Hearing Committee concluded that to connect the 1986 bombing of Tripoli to the 1988 Pan Am 103 bombing, one has to infer causation and retaliation not supported by the record. Applying the *Brown* test, the Hearing Committee could not reasonably conclude that Respondent obtained specific information in connection with his assistance to State Department officials concerning the bombing of Tripoli that would be useful in his later representation of Libya. Hearing Committee Report at 49. Bar Counsel has taken no exception to that conclusion, so we do not consider the 1986 bombing of Tripoli as a potential "matter" here.

On the other hand, the Hearing Committee concluded "that Respondent did participate personally and substantially while at the State Department in the response to the Pan Am 103 bombing, including the government's investigation and the establishment of liability for it." Hearing Committee Report at 51. The Board agrees.

A particular matter may be a discrete and isolatable transaction *or set of transactions. See Brown*, 486 A.2d at 42 n.4; *Committee for Washington's Riverfront Parks*, 451 A.2d at 1188. While a matter may be a single particular lawsuit, it also may encompass a "claim, controversy, investigation, . . . charge [or] accusation . . ." involving a specific party or parties according to the definition provided in Rule 1.11(g). The government's investigation and the establishment of culpability for the

Pan Am 103 bombing, both criminally and civilly, were such an isolatable set of transactions involving a particular act and specific parties. The act of the bombing of Pan Am 103 is a specific and discrete "situation or conduct," in the language of ABA Op. 342 at 6. A representation involving investigation is specifically contemplated in the Rules as one type of representation comprising a "matter," as long as it involves a specific party or parties, as required by Rule 1.11(g). Respondent concedes before the Board that the government's investigation of the bombing of Pan Am 103 is a "matter" within the meaning of Rule 1.11(a). Respondent's Opening Brief at 4. The parties are specific: the United States government, the victims of the bombing, Pan Am, and the perpetrators. The claim, controversy or investigation concerning who was responsible and liable for the bombing related to "the same issue of fact involving the same parties and the same situation or conduct." *Committee for Washington's Riverfront Parks*, 451 A.2d at 1188.

Respondent argues vigorously before the Board that because the perpetrators of the bombing were not known to be Libyan nationals while Respondent was Legal Adviser, he cannot be said to have participated in a matter involving Libya that is the same or substantially the same as the representation of Libya that he undertook in private practice. We disagree. A "matter" can be an "investigation" or "claim," under the definition provided in the Rules. It is inherent in the nature of an investigation or claim that all actors may not be identified during the representation. In this case, the event is discrete, and all of the other actors were known. The "matter" is not terrorism, or even Libyan terrorism. Such broad definitions of the "matter" here would be analogous to defining the "matter" in *Brown* as the property at issue, or the developer's goal of maximizing the value permitted under

the zoning laws applicable to the property. The Court rejected such a broad definition of "matter" in *Brown*, over a vigorous dissent. In contrast, the bombing of Pan Am 103 is a discrete event, and the legal activities flowing from the government's efforts to address it are an isolatable set of transactions. Put another way, the Pan Am 103 bombing was a single event that spun off into a number of legal issues and proceedings as the government investigated and attempted to impose responsibility.

Respondent urges the Board to define "the matter" here as a series of separate "matters," with each matter being one step or issue concerning his involvement in responding to the Pan Am 103 bombing as Legal Adviser. Respondent would have us treat the Civil Case subpoena, the government's investigation, and the Criminal Case each as separate matters. The Board does not believe that an investigation and the proceedings that impose responsibility can be so neatly separated. Respondent received briefings concerning the investigation of the bombing on a continuing basis so that he could provide legal advice, and he did so. He thus was knowledgeable and able to assist on the third-party subpoena matters because of that information, which he received as the top legal officer in the State Department. The third-party subpoena response in the Civil Case simply was part of the legal work called for as part of the investigation and effort to impose responsibility, as was activity involving an unnamed country's support for terrorism. The fact that Respondent's legal work involving the investigation took various forms does not diminish the fact that Respondent was available as counsel, and served as counsel, on a continuing basis concerning legal work required by the Legal Adviser to support the overall investigation and assessment of responsibility. It would be strange indeed if Rule 1.11(a) permitted a government lawyer to know the confidential

course of an investigation into an act, take some responsibility for legal reaction to those events, but then turn around in private practice and represent an alleged perpetrator of those same acts.

Respondent further contends that the description of the "matter" has evolved during this proceeding, and that he was not fairly on notice that the Hearing Committe would consider the investigation and efforts to establish responsibility for the bombing overall as a "matter." The record does not square with Respondent's argument.

Bar Counsel charged that Respondent violated Rule 1.11(a) in that "he [had] accepted other employment in connection with a matter that was the same as or substantially related to one or more matters in which he participated personally and substantially as a public officer or employee, namely, the interests of the government of the United States in connection with (a) acts of Libyan terrorism directed against United States citizens, (b) the Mass Disaster Litigation [the Civil Case], and/or (c) the Criminal Case." BX B, ¶ 34, at 9-10. Bar Counsel's original formulation was not identical to the Hearing Committee's articulation, which focused on the investigation and efforts to establish responsibility for the bombing. There can be no doubt that Respondent was fully aware of the gravamen of the charges against him, however. Bar Counsel articulated a view of the matter at issue during the hearing that incorporates all of the features of the "matter" as described by the Hearing Committee. II Tr. 273-302. The main difference seems to be that Bar Counsel characterized the "investigation" as pre-indictment proceedings in the criminal case. Respondent did not raise then, or in the extensive briefing to the Hearing Committee, any claim of surprise that the investigation and overall effort to establish responsibility could be considered a "matter." In any event, the charge against Re-

spondent never changed during the course of the proceedings. *See* Board Rule 6.3. At issue always was a single violation of Rule 1.11(a). Board Rule 6.3 certainly does not contemplate that the same words must be used throughout a proceeding to describe a Respondent's alleged misconduct.

If Respondent was substantially and personally involved in that activity, and then undertook a representation in private practice involving the same or substantially the same matter, he violated Rule 1.11(a). We turn to those prongs of the analysis.

2. *Was Respondent personally and substantially involved in the establishment of culpability for the Pan Am 103 bombing, including the government's investigation and the subsequent litigation?*

The Hearing Committee concluded that "Respondent's involvement in this matter while in the government was personal and substantial." Hearing Committee Report at 52. We agree.

Respondent received the State Department's daily written briefing reports and occasional oral briefings about sensitive or important matters, which periodically contained information about the progress of the United States government's investigation concerning the bombing. Findings of Fact, ¶ 9. Respondent also had access to classified communications and cables relating to the progress of the investigation and diplomatic efforts concerning the bombing. *Id.* Respondent personally participated in a diplomatic exchange with a country other than Libya "occasioned by the Pan Am 103 bombing," relating to that country's responsibility for terrorist activity, which included a direct contact by Respondent with that country. Findings of Fact, ¶ 11.

Respondent personally approved the memorandum to the State Department's Director General, regarding the response to be made by the State Department to Pan Am's third-party subpoena in the Civil Case. Findings of Fact, ¶¶ 16-17. The Hearing Committee specifically found that Respondent's approval of the memorandum "was not an insignificant or ministerial act," because it was undertaken pursuant to Respondent's policy of personal review of documents from his office going to an Assistant Secretary or higher official in the State Department Findings of Fact, ¶ 19. The Committee's finding that "Respondent's review and signing of this memorandum constituted the exercise of his discretion to approve the legal advice in the memorandum" is a finding supported by substantial evidence in the record, on which we defer to the Hearing Committee. *Id.*; *see In re Micheel*, 610 A.2d 231 (D.C. 1992); *In re Appler*, 669 A.2d 731 (D.C. 1995).

Respondent argues that even if his participation in the response to the subpoena was personal and substantial, it was not substantial participation in the underlying Civil Case. This is important to our analysis below as to whether a matter in which Respondent had personal and substantial responsibility is substantially the same as the later private representation, because Respondent's own retainer letter referenced the pending civil case as a matter that his representation would attempt to resolve. BX 10. In addition, one of the first tasks undertaken by HH&R in the representation of Libya was obtaining the docket entries in the Civil Case (Findings of Fact, ¶ 52), and it became increasingly clear in HH&R's dealings with OFAC as the representation began that, in order to be compensated, services were to be in connection with U.S. court cases. Findings of Fact, ¶¶ 38-41.

We agree with Respondent that responding to a third-party subpoena request alone may not in every case be

the equivalent of personal and substantial participation in all of the issues of the underlying litigation, particularly if the responding lawyer learns nothing about other issues in that litigation when dealing with the subpoena. But Respondent had additional involvement in issues related to the Pan Am 103 bombing while he was the Legal Adviser. He was periodically apprised of the progress of the continuing investigation to identify the perpetrators and he participated in a diplomatic exchange with a foreign country because of the Pan Am 103 bombing to convince that country to curtail its terrorist activities. Respondent attended or knew of a confidential meeting between Secretary of State James Baker, Mr. Busby of the State Department, and Thomas Plaskett, Chief Executive Officer of Pan Am concerning Pan Am's theory that the United States had some advance knowledge of bombing threats. Findings of Fact, ¶ 20. Respondent also participated in a decision about how fully to inform the State Department's representative concerning the State Department contact with Pan Am, in preparation for his testimony about the documents. Findings of Fact, ¶ 21.

While a lawsuit certainly can be a "matter" within the meaning of Rule 1.11(a), a matter that results in a lawsuit is not necessarily limited to that litigation. Respondent's overall involvement in the government's investigation and establishment of culpability for the bombing of Pan Am 103 was personal and substantial. Respondent was much more than the passive recipient of general agency information. As chief legal officer of the State Department, Respondent was kept abreast of the progress of the investigation and the diplomatic efforts in response to the bombing precisely so that he could provide legal advice and perform legal duties concerning the bombing when called upon to do so. In fact, Respondent did perform such service, when he communicated with an unidentified

country concerning its sponsorship of terrorism, sent the memorandum regarding Pan Am's third-party subpoena in the Civil Case, and approved the decision to inform the State Department's witness of the substance of the Secretary of State's meeting with the CEO of Pan Am because, in Respondent's legal judgment, it would not do any harm to State Department or United States interests. We conclude that Respondent was substantially and personally involved in representing the interests of the Department of State in the matter of the investigation of, and establishing culpability for, the bombing of Pan Am 103.

3. *Is the matter in which Respondent was personally and substantially involved while in government the same as, or substantially related to, the representation of Libya he undertook in private practice?*

Brown is our guide for analyzing whether Respondent's representation of Libya in private practice was the same as, or substantially related to, the investigation and establishment of culpability for the bombing of Pan Am 103, in which Respondent had personal and substantial involvement while in government. *Brown* sets out a two-part "substantial relationship" test: 1) Do the factual contexts of the government and private matters overlap, upon reconstruction of the scope of the prior legal representation; and 2) If the factual contexts overlap, is it reasonable to infer that the government attorney may have had access to confidential information legally relevant to, or otherwise useful in, the subsequent representation? 486 A.2d at 49-50. The Court opined in *Brown* that if the answer to these two prongs is yes, the Respondent may attempt to demonstrate through evidence concerning the scope of the legal representation involved in each matter that no

such information would have been received. The Court stressed that this rebuttal burden cannot be met "simply by claiming that no useful information was, in fact, received in the first matter." *Id.* at 50.

First, the factual contexts of Respondent's government representation and private representation clearly overlap. *See Brown*, 486 A.2d at 48 n.14, 50 n.17 ("[a] showing of overlapping factual contexts may be sufficient to create an inference that the government developed information during the first matter which could be useful in the later private matter, and thus that the two matters are substantially related"). Both concerned addressing responsibility for the same, particular event: the bombing of Pan Am 103.

Second, we conclude that a reasonable inference can be drawn that the Respondent had access to confidential information legally relevant to, or otherwise useful in, the subsequent representation. Respondent had access to confidential—even classified—information concerning the Pan Am 103 bombing. He received confidential written and oral briefings on the status of the investigation; learned of or attended a meeting about Pan Am's theory of why the United States had some notice of and potential responsibility regarding the bombing; and assisted in developing strategy in the Civil Case in response to Pan Am's third-party subpoena. Respondent acknowledges that some information he learned about the investigation into the Pan Am 103 bombing may remain confidential in both the security and ethical sense. II Tr. 47-48.

We need not speculate about how Respondent might have used what he learned while in government in his later representation of Libya, had it continued. Indeed, the Court in *Brown* counseled against an effort to identify each bit of confidential information to determine if the

government matter and private practice matter are substantially related. Counsel for Respondent agreed at oral argument that the confidential information need not be identified precisely. Transcript of Oral Argument, Jan. 9, 1997 at 12-13. The Hearing Committee and the Board do not know all of the confidential information Respondent received during his government service concerning the investigation and effort to establish culpability for the Pan Am 103 bombing. Some of that information remains confidential and classified, such as the identity of the country contacted by Respondent concerning its sponsorship of terrorism, the content of written and oral briefings and classified communications and cables received by Respondent concerning the investigation, and the substance of the United States government's investigation concerning its defense against Pan Am's allegations that the United States had advance warning of the bombing. Findings of Fact, ¶¶ 9, 11, 20-21. The Court in *Brown* set out a test focusing on the overlap between matters, which is sensible so that disciplinary action or disqualification motions do not themselves become the vehicle for exposing confidential information that could jeopardize the legitimate expectations of governmental agencies or the private parties who later retain former government lawyers.

Respondent argues vigorously that what he calls the "burden shifting" aspect of *Brown* should not be applied in the disciplinary context. He points out that principles of the Due Process and Board Rule 11.4 require that Bar Counsel carry the burden of showing a violation of a disciplinary rule by clear and convincing evidence. Because Bar Counsel and the Hearing Committee have not specified what confidential information was in jeopardy of being used or disclosed. Respondent claims, the overlap in the matters involved in his government service and private representation of Libya has not been demonstrated.

Respondent misapprehends what is prohibited by Rule 1.11(a). While protection of confidential information is one of the policies underlying the Rule, the test of the Rule imposes no burden on Bar Counsel to demonstrate what confidential information received in the government representation could be useful in the private representation. Such a requirement would make Rule 1.11(a) enforceable only at the high cost of spilling client confidences on the public record in the disciplinary proceeding. The Court instead constructed in Rule 1.11(a) a prohibition on handling overlapping matters in the government and then later in private practice. Handling such overlapping matters is itself the disciplinary violation prohibited by Rule 1.11(a). Respondent has not been required to disprove a required element of a Rule 1.11(a) violation. He has been given the opportunity to rebut Bar Counsel's proof that the two matters were "substantially related" with any proof he cares to bring forward showing that the factual contexts involved were sufficiently different that a reasonable person would conclude he did not receive confidential information in the government matter that could be useful in representing Libya in private practice.

We also have considered Respondent's argument that *Brown* arose in the context of a disqualifiation issue in a civil case. We conclude, however, for two reasons, that the Court intends to apply the approach set forth in *Brown* in the disciplinary context. First, the Court in *Brown* used as its overall frame of reference the parameters set by the disciplinary rule, at that time DR 9-101(B). The Court repeatedly described what private representations would violate the DR. *E.g.*, *Brown*. 486 A.2d at 39 ("This case presents the question whether two former attorneys for the District of Columbia violated DR 9-101(B). . ."); *Id.* at 42 ("we implicitly concluded

that, under DR 9-101(B), matters will be deemed the same if substantially related to one another"); *Id.* at 47 ("only three improprieties are addressed by DR 9-101(B). . . ."). Second, in Comment 4 to Rule 1.11, the Court expressly and clearly incorporated the *Brown* approach to determining whether matters are substantially related. Such case citation in the Comments to the Rules is unusual, and we conclude it means that the Court carefully considered whether the *Brown* analysis should be used in applying Rule 1.11(a), and decided that it should.

The Board has taken into account a significant respect in which the disqualification and disciplinary contexts differ. For purposes of disqualification, any doubt is to be resolved in favor of disqualification. *See Derrickson v. Derrickson*, 541 A.2d 149, 152 (D.C. 1988); *Brown*, 486 A.2d at 49. Obviously, doubts here are not resolved in favor of imposition of discipline. We have held Bar Counsel to the clear and convincing proof standard, defining the elements of proof as set forth in the text of the Rule itself, guided by Comment 4 and *Brown*.

Our analysis differs from that of the Hearing Committee mainly in that we do not speculate about what confidential information learned by Respondent as Legal Adviser could be useful in the private representation of Libya. The Hearing Committee hypothesized that the information Respondent learned while Legal Adviser that implicated two countries other than Libya could be useful in attempting to argue for a lower *ex gratia* payment to families of the victims on grounds that recovery from Libya in litigation was not certain because some evidence could point to other culprits. Hearing Committee Report at 55-57. The public member of the Hearing Committee, like the Respondent in his exception filed before the Board, argues that this theory ignores Respondent's re-

fusal to defend the conduct of Libya or the Libyan nationals indicted for the bombing as part of his representation. Respondent argues he would not, in fact, have used any information he learned while in the government to the detriment of any party in seeking a consensual resolution. He stated that he was proceeding on the assumption that Libya was responsible for the bombing. II Tr. 114.

The Board concludes that this debate is a red herring for purposes of determining whether Respondent violated Rule 1.11(a). It is impossible to know what course Respondent's representation of Libya would have taken had it continued, and Respondent still holds in confidence information he received as Legal Adviser about the bombing. Although we, like the Hearing Committee (Hearing Committee Report at 65), credit Respondent's testimony that he intended to pursue only consensual resolutions, he was Libya's lawyer. He was not a mediator, hired by both sides to facilitate a resolution. As Respondent stated, he was not going to lobby on behalf of Libya, but he "was a lawyer doing things that a lawyer does." I Tr. 221. His ethical obligation was to reach the best result for Libya that would be acceptable to other parties. The payment that Respondent contemplated—an *ex gratia* payment, or payment made without acknowledgment of responsibility —did not preclude him from vigorously negotiating the amount of and means of paying the settlement.

Clearly the private representation was contemplated to be a very substantial matter involving how to accomplish Libya's acceptance and payment for the liability in a way that would extinguish its obligation to the families of the victims and the international community. Bar Counsel rightly points out that Respondent's contemporaneous descriptions of the representations were broad and far reaching. When Respondent was considering representing

Libya, he told Mr. Gerson, who represented relatives of the victims in seeking damages from Libya, that he "may be on the other side." I Tr. 112. The retainer agreement also defined the private representation in broad terms: The representation of Libya "in connection with on-going civil and criminal disputes and litigation relating to the destruction of Pan Am 103," "investigating facts and legal proceedings, preparing legal analyses, providing legal advice and preparing legal steps to deal with this matter," and representations not including "*substantial* activities as litigators," but "limited to activities associated with agreed upon measures, including consensual resolutions." BX 10 (emphasis added).

The Hearing Committee believed that one of the most telling pieces of evidence at the hearing was Respondent's testimony concerning whether there would have been an ethical issue had he agreed to represent Libya for all purposes, including defending it in litigation. Respondent said he would not have considered such a representation, but acknowledged that it would have raised an ethical issue because:

> I felt that if I were representing Libya at least an appearance would arise that I had access to information about the two other potential culprits—if I were defending Libya, that I would have access to information about the two other culprits that might be helpful in that context.

II Tr. 113-14.

The Board agrees with this assessment. The fact that Respondent was privy to highly confidential communications as Legal Adviser about precisely the event that was at the heart of the negotiation presents the situation that Rule 1.11(a) was intended to prevent. Rule 1.11(a) is

a broad prophylactic rule that does not depend on the subjective intent of a lawyer, or even what a lawyer does with the information. A lawyer cannot agree to a representation and put himself in a position where he has to shape the private representation to avoid use of information learned in the government. The Rule prevents a representation in which a lawyer *could* use confidential information learned while employed in the government. While Respondent was employed in the government, his client had a terrible and tragic problem, which resulted in legal activity on several fronts. The core of fact at the heart of each piece of legal activity is the same: why and how Pan Am 103 blew up over Lockerbie.

We do conclude that Respondent violated a Disciplinary Rule for all of these reasons, not because he undertook to represent an unpopular client. Many difficult representations that satisfy the highest ethical demands of the legal profession involve clients who have committed despicable acts. Nor do we rely on the appearance of impropriety that caused public condemnation of Respondent's private representation of Libya. While policy considerations involving the appearance of impropriety are one of several underlying rationales for the Rule, such appearances do not constitute or prove a violation.

In sum, like the Hearing Committee, we do not believe that Rule 1.11(a) allows a government lawyer to be briefed in the course of his official duties about a particular, sensitive investigation into a discrete event, so that he can provide legal advice, thereby learning important confidential information, provide substantial and personal legal assistance concerning the government's efforts, then leave the government and represent a suspect in the same investigation. We conclude that Respondent violated Rule 1.11(a).

IV. PROPOSED SANCTION

In determining the appropriate sanction, the Court looks to the seriousness of the violation, any harm as a result of the violation, any prior disciplinary violations by Respondent, and mitigating or aggravating circumstances. *See, e.g., In re Peek*, 565 A.2d 627, 632 (D.C. 1989); *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (*en banc*); *In re Knox*, 441 A.2d 265 (D.C. 1982); *In re Haupt*, 422 A.2d 768, 771 (D.C. 1980).

Bar Counsel urged, and the Hearing Committee agreed, that an informal admonition is appropriate here. While the offense is serious, Respondent's offense was one of omission. He failed to recognize his Rule 1.11(a) dilemma, consult the State Department, obtain an independent ethics opinion, or even have a full analysis done by his firm's ethics committee. While these steps are not required by the Rules, some additional caution at the outset could have averted this proceeding.

On the other hand, we recognize that this is a case of first impression under Rule 1.11(a). Respondent's argument that application of *Brown* in the disciplinary context results in inappropriate burden-shifting is hardly trivial, and is advanced in good faith.

Certainly no sanction harsher than an informal admonition is required to conform Respondent's future conduct to the Rules. Respondent has no prior disciplinary record, and has an exemplary 30-year legal career including service as a prosecutor, professor, federal judge, and senior State Department official. Little or no harm was caused by Respondent's brief representation of Libya. He withdrew very early in the representation, and while his reason for withdrawing was the adverse reaction that he felt would interfere with his ability to represent Libya effectively, there was no harm to the client or any breach of confidence.

We have no comparable Rule 1.11(a) case to use as a parallel for purposes of assessing consistent discipline, but are confident that an informal admonition is appropriate.

CONCLUSION

The Board recognizes that the application of Rule 1.11(a) is very important to the many members of our Bar who have served, or who aspire to serve, in government. The disciplinary system must protect the interest of the public by discouraging attorneys in government from shaping their practice to give unfair advantage to their later private clients, or from jeopardizing confidential information learned in government service. At the same time, government service should not be discouraged by ethical rules that prohibit government lawyers from making reasonable and appropriate use later in private practice of the expertise they have gained. The Court struck that balance in Rule 1.11(a). The Board views the application of Rule 1.11(a), and the balance struck between the policy interests served by the Rule, as fair and reasonable on the facts presented in this case.

The Board hereby directs Bar Counsel to issue an informal admonition to Respondent.

BOARD ON PROFESSIONAL
RESPONSIBILITY

By: /s/ Patricia A. Brannan
PATRICIA A. BRANNAN
Vice-Chair

All members of the Board concur in this Order except Mr. McKay, who is recused, Ms. Zumas, who did not participate, and Mr. Banks, who files a dissenting opinion.

June 30, 1997

DISSENTING OPINION

The Hearing Committee correctly stated that the essential elements to prove a violation of Rule 1.11(a) are:

(1) a government lawyer

(a) participates as a public employee in a matter,

(b) both personally and substantially;

(2) followed by the lawyer's leaving the government and accepting employment in another matter that is

(a) the same as or

(b) substantially related to the original matter.[1]

The Committee found that Respondent participated in two matters while in the government that are relevant here: (1) the government's decision to bomb Tripoli, and (2) "the establishment of culpability for the 1988 Pan Am 103 bombing, including the government's investigation and the ensuing litigation concerning the bombing."[2] I agree with the Committee's finding that the Tripoli bombing was sufficiently unrelated to the Pan Am bombing that Respondent's admittedly considerable involvement in the government's response to the former would not preclude him from representing a client's interests in the latter.

Respondent undertook to provide legal "advice to the Government of Libya about civil and criminal litigation relating to the Pan Am 103 disaster. . . ."[3] Thus, the Committee's characterization of the second matter in

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[1] Hearing Committee Report at 36.

[2] *Id.* at 46.

[3] Specification of Charges, No. 26, admitted by Respondent.

which Respondent participated while in the government is consistent with the representation he undertook on behalf of Libya.

I part company with the Committee and the majority on the degree of Respondent's involvement in that matter while he served in the government. The record discloses that Respondent had virtually no involvement in the investigation of the Pan Am bombing. The investigation was handled by the State Department's Office on Counter-terrorism and the Department of Justice.[4] Respondent was apprised of the progress of the investigation through routine, daily written briefings provided to the twenty-five top State Department officials, which covered a wide range of topics.[5] Throughout that portion of the investigation conducted while Respondent was in the State Department, the government believed, and Respondent received briefings supporting the theory, that Iran and Syria were responsible for the Pan Am bombing.[6] It was not until after the Respondent left the State Department in June of 1990 that he learned that the government had information linking Libya to the bombing.[7]

In my view, the record does not support a finding that Respondent had either a personal or a substantial involvement in the investigation of the bombing. He merely received periodic briefings about the progress of the in-

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[4] Amicus Curiae Reply Brief at 17; H.C. Report ¶¶ 14-16 at 10-11.

[5] H.C. Report, ¶ 9 at 8.

[6] Sometime after the bombing, Respondent was sent to a country other Libya to persuade it to stop its terrorist activities. *Id.*, ¶ 11 at 9. It is not apparent from the record that this diplomatic exchange was related to the Pan Am investigation.

[7] *Id.*, ¶ 23 at 15-16.

vestigation being conducted by the Office on Counterterrorism and the Department of Justice.[8]

The record also does not support a finding that Respondent had a substantial role in the civil and criminal litigation spawned by the bombing. Again, the Department of Justice was responsible for representing the government in all such litigation. Respondent's only involvement was to initial one memorandum, prepared by an attorney in the Office of Counterterrorism and approved by the *deputy to* the head of that office, recommending State's response to a single set of subpoenas seeking documents served on the agency by Pan Am.[9] The "responsive documents were not attached" to the memorandum Respondent initialed,[10] and Respondent testified that he considered the memorandum to be a routine response to a subpoena for documents.[11] Respondent initialed the memorandum and routed it to the State Department's Director General, who had the ultimate authority to provide the agency's response. Later, Respondent had a conversation with Mr. Morris D. Busby, the head of the Office on Counterterrorism. Respondent agreed with Mr. Busby that Mr. Busby's designated witness to testify on the events described in the responsive documents should be informed that Pan Am's Chief Executive Officer had met with the Secretary of State and Mr. Busby, and of the substance of that meeting. Respondent did not re-

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[8] The information Respondent received in the daily briefings concerning the investigation. directed at the culpability of Iran and Syria, would not have afforded him an advantage settling claims against a country that was not a target of that investigation during his tenure.

[9] H.C. Report, ¶ 17 at 12.

[10] *Id.*, ¶ 16 at 12.

[11] *Id.*, ¶ 18 at 12.

member whether he was present at the Secretary's meeting with Pan Am, but he did remember being informed of it by Mr. Busby.[12]

Respondent's role in the agency's response to one set of subpoenas served on the State Department (concerning allegations the government considered utterly groundless), does not amount to substantial involvement in the civil and criminal cases. Those cases were handled by the Department of Justice, and substantive assistance from the State Department was lent by the Office of Counter-terrorism, not Respondent.[13] The criminal case was initiated on November 13, 1991 with the indictment of two Libyans, seventeen months after Respondent's departure from State. Obviously Respondent played no role in the development of the factual bases for these indictments.

While I do not believe that Rule 1.11(a) precluded the representation, Respondent and his firm, Hughes, Hubbard & Reed, did not take the one simple step that would have significantly diminished the appearance of impropriety. It was the negative reaction of the public due to the appearance of impropriety that terminated the representation and led Bar Counsel to initiate this proceeding. At the very least, Respondent should have notified the State Department of his intention to represent Libya, and inquired as to whether State perceived a conflict with this representation. The most prominent factor that led Libya to approach Respondent is the fact that he was the Legal Adviser for the State Department at the time of the bombing. To dispel any perception that his former position would have afforded him or his putative

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12 *Id.*, ¶ 20 at 13-14.

13 When Respondent left the government, no viable theory for the civil cases had yet been developed, for the government still believed that Iran and Syria were responsible for the bombing.

client an unfair advantage, it was incumbent upon Respondent to consult with State before accepting the representation. It is conceivable that State would have concluded that Respondent's role in the matter was so minimal, and occurred at such an early stage in the investigation, that it would interpose no objection to the representation.[14] Indeed, Respondent's immediate successor as Legal Adviser, Edwin D. Williamson, is the author of the *Amicus Curiae* briefs opposing the application of Rule 1.11(a).[15] However, Respondent and his firm specifically rejected this option, fearing that merely making the inquiry would cause a "bombshell" that might endanger its $3.0 million retainer agreement with Libya.[16]

Libya was notorious to most Americans before the Lockerbie bombing, and the discovery of its culpability for that atrocity only exacerbated the public's hostility. Any firm that agreed to accept a sizable retainer to represent the interests of a rogue state that sponsored the murder of hundreds of innocent individuals would encounter a negative public reaction.

At oral argument before the Board, counsel for the firm insisted that the firm had crossed every "t" and dotted every "i" to resolve any ethical concerns. The firm effectuated the resignation of one of its attorneys who represented a pre-existing client seeking compensation from Libya for the bombing.[17] It also "walled off" a law clerk

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[14] *See* Rule 1.9.

[15] Mr. Williamson left the State Department sometime before Respondent agreed to represent Libya.

[16] H.C. ¶ 47 at 27.

[17] Libya's sovereign immunity rendered a recovery for the individual client problematic, while Libya's $3.0 million fee was deposited in advance, $250,000 to be drawn monthly, irrespective of the number of hours worked. H.C. ¶ 33 at 19-20.

who had served as the Associate Coordinator in the State Department's Office on Counterterrorism in 1992-93.[18]

While the firm eliminated these two obvious conflicts, at no cost to the firm, it chose not to consult the State Department, knowing that a negative response would make the Libyan representation untenable. However, declining to consult with State left the firm defenseless to critical articles in the press. The firm issued a press release on July 12, 1993 announcing its representation of Libya. On July 14, 1993, the *Washington Post* criticized the representation in an article entitled "Indecent Proposal." In response to media inquiries concerning the firm's press release, the State Department declined to comment.[19] The next day Respondent wrote two letters to State's Legal Adviser, pressing the Department for an immediate vindication of the representation. When State declined to provide an overnight opinion, Respondent and the firm withdrew from the representation the next day, July 16, 1993.

Neither the State Department nor the Department of Justice initiated a complaint of an ethical violation against Respondent. Had Respondent consulted State in advance, and given the agency a reasonable opportunity to review his prior involvement in the matter,[20] he might have been able to proceed with the representation, and to avoid this proceeding.

/s/ Terry Michael Banks
TERRY MICHAEL BANKS

Dated: June 30, 1997

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18 *Id.*, ¶ 48 at 27-28.

19 *Id.*, ¶ 54 at 30.

20 The Legal Adviser in July 1993 was at least the second to hold that position since Respondent left in 1990. *Id.* at 3; ¶ 56 at 31.

APPENDIX C

DISTRICT OF COLUMBIA COURT OF APPEALS BOARD ON PROFESSIONAL RESPONSIBILITY HEARING COMMITTEE NUMBER ONE

Bar Docket No. 280-93

In the Matter of:

ABRAHAM D. SOFAER, ESQUIRE,
Respondent.

REPORT AND RECOMMENDATION OF HEARING COMMITTEE NUMBER ONE

I. INTRODUCTION

On December 21, 1988, Pan American Flight 103 was blown up over Lockerbie, Scotland, killing everyone on board and eleven people in the town below. The United States undertook an intensive investigation to identfy the perpetrators of this terrorist act, and the families of the victims sued Pan Am for damages arising from the bombing. At the time of the bombing and the beginning of the investigation, Respondent was the Legal Adviser in the United States Department of State. In June 1990, Respondent left the State Department to join the Washington office of the law firm of Hughes, Hubbard & Reed (HH&R). In November 1991, two Libyans were indicted by a federal grand jury for the bombing.

In July 1993, Respondent and HH&R were retained to represent Libya in connection with criminal and civil disputes and litigation arising from the Pan Am 103 bombing. Respondent intended to seek consensual monetary settlements with the families of the victims and negotiate arrangements by which Libya would surrender the two indicted Libyans for trial by the United States and the United Kingdom in a mutually agreeable venue. In mid-July 1993, soon after Respondent's retention by Libya became public, he and HH&R withdrew from the representation, stating that the adverse public and governmental reaction made it impossible to accomplish the purposes for which they were retained. II Tr. 122.[1]

Shortly thereafter, Bar Counsel initiated an investigation into Respondent's possible violation of District of Columbia Rule of Professional Conduct 1.11(a). This rule prohibits a former government lawyer from representing a party in connection with a matter that is the same as or substantially related to a matter in which the former government lawyer participated personally and substantially while working in the government. After lengthy investigation and discussions with Respondent and his counsel, on July 25, 1995, Bar Counsel charged Respondent with violating this rule.

Hearing Committee Number One conducted evidentiary hearings in this case on December 5 and 6, 1995.[2] The

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[1] In this report, "BX" refers to Bar Counsel's Exhibits; "RX" to Respondent's Exhibits; "I Tr." to the transcript of the hearing before the Hearing Committee on December 5, 1995; and "II Tr." to the transcript of the hearing on December 6, 1995.

[2] Two pre-hearing conferences were held before the Chair of the Hearing Committee on August 31, 1995, and December 1, 1995. At the August 31 conference, Respondent's motion to strike portions of the Bar Counsel's Specification of Charges as irrelevant

Hearing Committee was composed of Glenn A. Fine, Esquire, Chair; Elizabeth Sarah Gere, Esquire; and Jean R. Warnke. Bar Counsel was represented at the hearings by Leonard Becker, Bar Counsel, and Michael S. Frisch, Senior Assistant Bar Counsel. Respondent was represented by David B. Isbell, Esquire, and Jeffrey B. Coopersmith, Esquire, of Covington & Burling.

At the hearings, Bar Counsel introduced Bar Counsel Exhibits A through D and 1 through 47, which were admitted in evidence. Bar Counsel presented the testimony of Morris D. Busby (the former Director of the State Department's Office on Counterterrorism), William B. Hoffman (the chief counsel of the Treasury Department's Office of Foreign Assets Control (OFAC)), and Allan Gerson (a former HH&R lawyer who represented two men whose relatives were killed in the Pan Am 103 bombing).

Respondent introduced Respondent Exhibits 1 through 77, which were also admitted in evidence. Respondent testified and presented the testimony of five other witnesses: Samuel Buffone (a Washington lawyer who consulted with Respondent on the resolution of international matters), James G. Hergen (a lawyer in the State Department Legal Adviser's Office), Edwin W. Williamson (the State Department Legal Adviser who succeeded Respondent), Charles Scherer (the managing partner of HH&R), and John Townsend (the managing partner of HH&R's Washington office).

After the evidentiary phase of the hearing, the Hearing Committee briefly went into executive session, but reserved decision on whether Respondent had violated Rule 1.11

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was denied. At the December 1 conference, the Department of Justice was granted leave, without objection of the parties, to participate in the hearings for the limited purpose of raising objections to the disclosure of classified information.

(a). The Committee authorized the parties to submit additional documentary evidence or further evidence in aggravation or mitigation of sanction within fifteen days. Several days after the hearing, Respondent submitted, without objection of Bar Counsel, the affidavit of Peter Flory, an HH&R law clerk who had worked in the State Department's Counterterrorism Office and who was screened by HH&R from any involvement in its representation of Libya. No further evidence in mitigation or aggravation was offered.

After the evidentiary record was closed, Bar Counsel presented Proposed Findings of Fact, Conclusions of Law, and Recommendation as to Sanction. Respondent filed Proposed Findings of Fact and Conclusions of Law ("Respondent's Brief"). Bar Counsel then submitted a Reply Brief, and Respondent submitted a Surreply Brief. On April 26, 1996, the Hearing Committee requested supplemental briefs on the appropriate legal standard to be applied in determining whether matters were substantially related under Rule 1.11(a). On May 10, 1996, Bar Counsel and Respondent filed supplemental memoranda addressing this issue.[3]

This report describes the Committee's Finding of Fact, Conclusions of Law, and Proposed Sanction. Most of the facts in this case are not in dispute. Whether these facts prove a violation of Rule 1.11(a) is greatly disputed. As far as we could determine, there are no cases in this or any other jurisdiction involving a disciplinary proceeding under Rule 1.11(a) or a similar state disciplinary rule.

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[3] The presentations by Respondent's counsel and the Office of Bar Counsel, both at the hearings and in the briefs, were superb. We believe that counsel on both sides deserve much praise for their work and their consummate professionalism throughout this proceeding.

As described below, we conclude that Respondent's representation of Libya constituted a violation of Rule 1.11(a).[4]

II. FINDINGS OF FACT

1. Respondent is a member of the District of Columbia Bar, having been admitted on November 22, 1989. BX A.

A. *The Tripoli Bombing*

2. Respondent served as the State Department's Legal Adviser from June 1985 to June 15, 1990. I Tr. 177; BX 40; RX 5. In this position, he was the State Department's chief legal counselor and supervised the activities of the State Department's Office of the Legal Adviser. Answer to Specification of Charges ("Ans.") at ¶ 2; RX 55. Respondent and the other attorneys in his office provided legal advice to the Secretary of State and to other officials in the State Department and the United States government. RX 55.

3. While Respondent was the Legal Adviser, the United States government was grappling with the appropriate response to certain acts of terrorism connected to the Libyan government. These acts included the December 1985 bombings of the Rome, Italy, and Vienna, Austria airports. Respondent met periodically with a high-level, interagency group of lawyers to consider legal issues related to the possible use of force against Libya in retaliation for its sponsorship of these terrorist acts. I Tr. 186-90; II Tr. 17-20, 39-40. Other lawyers in this group

[4] The public member of the committee, Jean Warnke, dissents from the Conclusions of Law and believes that Respondent's conduct did not violate Rule 1.11(a). Her dissent is attached to this report.

included the Counsel to the President, the Legal Adviser to the National Security Council, the General Counsel of the Central Intelligence Agency, the General Counsel of the Department of Defense, the Legal Counsel to the Chair of the Joint Chiefs of Staff, and the Assistant Attorney General for the Office of Legal Counsel in the Department of Justice. I Tr. 186; Ans. at ¶ 3; RX 74.

4. On April 5, 1986, a bomb exploded in a discotheque in Berlin, Germany, killing several United States military personnel. RX 74 at ¶ 4. The United States government learned that this bombing was also connected to the Libyan government. As a result, the United States decided to take retaliatory action against Libya. Respondent met with the interagency group of high-level government lawyers to provide legal advice to administration officials on the sufficiency of the evidence linking Libya to the Berlin discotheque bombing, the necessity for the use of force against Libya, the proportionality of the proposed response, and the applicability of the War Powers Resolution to the proposed retaliation. I Tr. 187-89; II Tr. 15-16, 36-41; RX 74.

5. While participating in these discussions, Respondent learned details of communication intercepts linking the Berlin discotheque bombing to Libya. He also learned about passports seized from the Abu-Nidal terrorists who had committed the Rome and Vienna airport bombings, which also connected the terrorists to the Libyan government. Respondent was informed of other possible acts of terrorism that Libya was planning. Finally, Respondent was informed about potential Libyan targets that the United States was considering bombing. II Tr. 16-19.

6. On April 15, 1986, the United States government bombed Tripoli, the capital of Libya. II Tr. 22; RX 74 at ¶ 4.

7. Much of the classified information that Respondent learned before the Tripoli bombing about Libyan terrorism was publicly disclosed by the United States government after the bombing. Respondent was not sure if all the information he learned was disclosed. He testified that he thought that all of the "significant" information, but not the way the intelligence was gathered, was made public. II Tr. 18-19, 40-41; RX 6; RX 74. Respondent himself published an article, cleared by United States government authorities, concerning Libya's terrorist activities. RX 7.

B. *The Pan Am 103 bombing*

8. On December 21, 1988, Pan Am Flight 103, en route from London, England to New York, New York, was blown apart over Lockerbie, Scotland by a plastic explosive hidden in a radio cassette player placed inside a suitcase on the flight. All 289 persons on board and 11 persons in Lockerbie were killed. Ans. at ¶ 4; RX 12.

1. *The Investigation*

9. The Pan Am 103 bombing sparked a massive hunt by the United States and the United Kingdom for the perpetrators of this heinous act. BX 39 at 3. As the State Department's Legal Adviser, Respondent received the State Department's daily written briefing report about sensitive or important matters. This classified report was provided to approximately twenty-five top officials in the State Department. The report periodically contained information about the progress of the United States government's investigation concerning the bombing. I Tr. 191, 206-07; II Tr. 95-96, 115-16; BX 40; BX 42. Respondent also received oral briefings about matters of interest in the State Department. These briefings were provided by State Department Bureau of Intelligence and

Research officials to top State Department officials, including the Secretary of State, the Deputy Secretary, Under-Secretaries, a number of Assistant Secretaries, and the Legal Adviser. Respondent testified that these oral briefings "from time to time" included information about the progress of the Pan Am 103 investigation. II Tr. 42-44, 87-88; BX 40 at 2; BX 42. Between the time of the Pan Am 103 bombing and his departure from the State Department, Respondent also had access to classified communications and cables relating to the progress of the investigation and diplomatic efforts concerning the bombing. BX 25; BX 37; BX 39 at 4. The documents to which he had access remain classified, and Respondent did not have a specific recollection of their exact content beyond information that was published in newspapers at the time of the investigation. BX 39 at 4.

10. While Respondent was the Legal Adviser, the United States government's investigation into the Pan Am 103 bombing focused not on Libya but on two other countries. The United States initially believed the chief suspects in the bombing were the Iranian Revolutionary Guard Corps in Iran or the Popular Front for the Liberation of Palestine in Syria, or both. Iran and Syria were also suspected of supporting these terrorist groups in committing the bombing. Iran was suspected partly because a United States Navy ship had shot down an Iran civilian aircraft over the Gulf of Iran in 1988. I Tr. 207-08; II Tr. 32-33; RX 12. In the classified briefings Respondent received as the Legal Adviser, he was informed of the evidentiary basis for suspecting that these two entities and Iran and Syria had sponsored the Pan Am 103 bombing. II Tr. 46-48, 54-55; II Tr. 205-07; BX 37; BX 39 at 4; RX 61.

11. Sometime after the Pan Am 103 bombing, Respondent participated in a diplomatic exchange with a

country other than Libya, "occasioned by the Pan Am 103 bombing," relating to that country's responsibility for terrorist activity generally. BX 39 at 4. Respondent was dispatched to that country to persuade it to stop its terrorist activities. The details of that exchange, including the country involved, remain classified and were not disclosed at the hearing. *Id.*; I Tr. 192-93.

2. *The Pan Am 103 Civil Litigation and Non-Party Subpoenas*

12. In 1989, families of the victims of the Pan Am 103 bombing filed wrongful death lawsuits against Pan Am and other defendants in several federal courts. Ans. at ¶ 7; BX 18. In April 1989, the federal Judicial Panel on Multidistrict Litigation consolidated for pretrial purposes the federal lawsuits into one proceeding, *In re Air Disaster at Lockerbie, Scotland*, before the United States Court for the Eastern District of New York (Platt, J.) (hereafter "the Civil Case"). Ans. at ¶ 7; BX 18 at 1-2.

13. On September 27, 1989, Pan Am served non-party subpoenas on the State Department and five other government agencies, seeking documents and the identification of knowledgeable witnesses relating to a theory by Pan Am that the United States government had advance warning of the Pan Am 103 bombing but failed to take adequate steps to prevent it. BX 1; BX 2; BX 3; RX 13.

14. On November 21, 1989, the Justice Department, which represented government agencies on subpoena matters such as this, moved to quash the subpoenas because of its on-going criminal investigation into the bombing. RX 13; BX 1. On December 29, 1989, the Justice Department wrote to all six agencies asking for their positions on the disclosure of their documents responsive to the subpoenas. BX 1. The letter pointed out that the Jus-

tice Department would respond to the subpoenas on behalf of all six agencies. The letter stated that the Justice Department wanted the agencies' position on disclosure under their "administrative or housekeeping regulations." The letter also noted that all the agencies believed that Pan Am's allegations were unfounded. *Id.*

15. On January 31, 1990, the Justice Department again wrote to the six agencies, providing a report on the status of its motion to quash the subpoenas and describing in detail Pan Am's theory of United States government liability for the bombing. The substance of Pan Am's theory, as described in this letter, was that the United States government, through the CIA, received several specific warnings in the days just before the Pan Am 103 bombing about plans for an explosive to be placed on a Pan Am flight. Allegedly, some of the warnings and tips identified as the target of the attack the specific Pan Am 103 flight that was bombed. BX 2.

16. An attorney in the State Department's Office of the Legal Adviser drafted a memorandum recommending the State Department's response to the subpoena. BX 3; RX 64 at ¶ 10; II Tr. 143. The draft memorandum was to be transmitted from Respondent. as the Legal Adviser, and Mr. Busby, as the head of the State Department's Office on Counterterrorism, to Edward Perkins, the State Department's Director General, who responds to such subpoenas on behalf of the State Department. I Tr. 193-97; BX 40 at 2. The memorandum noted that a search of State Department files revealed approximately 400 documents responsive to Pan Am's request, but many of these documents originated with other agencies and would have to be referred to these agencies for their position on release. The memorandum stated that approximately half of the documents were classified and

therefore could not be released under the "state secrets" privilege. The memorandum also reported that the Justice Department would ask for the documents to be withheld if it determined that their production would prejudice the criminal investigation. Finally, the memorandum recommended that Frank Moss, an official in the State Department's Office on Counterterrorism, should be designated as the appropriate State Department witness to testify on the events described in the responsive documents. BX 3; I Tr. 34. Attached to the memorandum were the Pan Am subpoena and the letters from the Justice Department concerning the subpoena, but the responsive documents were not attached. I Tr. 40-41; BX 3.

17. Respondent read the memorandum, dated January 31, 1990, and its attachments. He did not believe that he saw any of the documents that were responsive to the subpoena. After reviewing the memorandum and attachments, Respondent approved the memorandum by initialling it. The memorandum was also signed by Mr. Busby's deputy on his behalf and sent to Mr. Perkins. I Tr. 33-34, 39-40, 194-95; II Tr. 49; BX 3; BX 41 at ¶ 5.

18. Both Bar Counsel and Respondent advanced much testimony at the hearing relating to whether Respondent's review and approval of this memorandum was, as Respondent claimed, routine and unimportant or, as Bar Counsel argued, substantial and significant. Respondent testified that because he believed Pan Am's allegations were meritless, he did not give much consideration to the contents of the memorandum. He testified that he considered the memorandum to be a routine response to a subpoena request for documents. II Tr. 124-25. He also testified that, as Legal Adviser, he approved "a couple of dozen" memoranda per year dealing with State Department responses to subpoenas, and he perfunctorily approved this one as well. *Id.*; II Tr. 106.

19. Bar Counsel provided evidence, however, that Respondent had instituted a policy that all documents from his office going to an Assistant Secretary or higher official in the State Department had to be reviewed by him, and this memorandum fit into that category. I Tr. 197-98; II Tr. 105-06; BX 41 at ¶ 5; RX 64 at ¶ 12. Respondent enforced this policy because he wanted to be aware of and involved in advice given by his office to higher-level officials in the State Department. II Tr. 176-80. Respondent also admitted that on rare occasions, he returned a memorandum to his staff when he disagreed with its contents. II Tr. 106. Moreover, while Respondent may have approved dozens of documents dealing with the State Department's responses to subpoenas, this response was lengthier, related to a more complicated third party case, involved more documents than normal, concerned sensitive intelligence matters, and related to a criminal investigation being pursued by the Department of Justice. II Tr. 157, 173-76. Therefore, we conclude that Respondent's review and signing of this memorandum constituted the exercise of his discretion to approve the legal advice in the memorandum and was not an insignificant or ministerial act.

3. *The Meeting with Pan Am and the Busby Consultation*

20. In the fall of 1989 a meeting was held among Secretary of State James Baker, Mr. Busby, and Thomas Plaskett, the Chief Executive Officer of Pan Am. I Tr. 29-30.[5] Respondent testified that he did not know whether he attended the meeting, although he knew he was informed about the meeting by Mr. Busby. I Tr.

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[5] The exact date of the meeting was not established, but it apparently occurred sometime in the fall of 1989. I Tr. 49; II Tr. 22-23, 33.

202-04. *But see* II Tr. 111 ("I did recall the Pan Am theory and I did recall being in a meeting"); BX 39 at 5 ("I do recall, and may have attended the [Baker/Plaskett meeting]"); BX 41 at ¶ 2 ("I did recollect having attended a meeting with representatives of Pan Am"). The purpose of the meeting was for Mr. Plaskett to apprise the Secretary of State about the allegation, discussed above, that the United States government may have had advance warning of the Pan Am 103 bombing and therefore shared some culpability for it. I Tr. 30, 46; BX 2 at 3-4. Respondent was also informed after the meeting that the United States government investigated the allegations raised by Pan Am and believed them to be meritless. I Tr. 42-44; II Tr. 11-12, 111; BX 41 at ¶ 2.

21. When the State Department received Pan Am's non-party subpoena, Mr. Busby asked Respondent if Frank Moss, the State Department official who was designated as the State Department's knowledgeable witness in response to the subpoena, should also be informed about the information in the State Department's possession concerning Pan Am's theories and the Baker/Plaskett meeting. I Tr. 203-04. Mr. Busby had told only a limited number of government officials about the substance of the Baker/Plaskett meeting because of the sensitivity of the subject and the on-going investigation into the bombing. But by January 1990 Pan Am's theory had been discounted by the United States government. I Tr. 31, 47-49. Respondent learned that the State Department and other government agencies had investigated Pan Am's contentions and believed them to be baseless. I Tr. 201-02; II Tr. 11-12, 135. Respondent testified that he did not think it would do any harm to notify Mr. Moss about the substance of the Baker/Plaskett meeting. I Tr. 203-04. Respondent therefore advised Mr. Busby that Mr. Moss should be informed of the discussions at the meeting. *Id.*

4. *Subsequent Events in the Pan Am 103 Investigation and Litigation*

a. *Attention Focuses on Libya*

22. Sometime during June 1990, the United States government uncovered information linking Libya to the Pan Am 103 bombing. Investigators determined that the bomb that destroyed Pan Am 103 was activated by a sophisticated electronic timer that had been delivered to Libyan intelligence officials. This timer was identical to other timers used by Libyan terrorists who had been captured in 1988. Therefore, in June 1990, the United States government began to focus its investigation on Libya. RX 12; RX 61.

23. The evidence at the hearing indicates that Respondent did not learn of the new information linking Libya to the Pan Am 103 bombing while he was the Legal Adviser. He left the State Department to join HH&R on June 15, 1990. I Tr. 177. Although it is unclear exactly when in June 1990 the United States learned of the new evidence pointing to Libya, Respondent testified forcefully and credibly that he did not know about it while at the State Department. He said he learned about the evidence in November 1991, after he had left the State Department, when the indictment of two Libyans for the bombing was announced. I Tr. 208-09; II Tr. 35; BX 25. Respondent's testimony was supported by an article he wrote for *The Washington Post* in July 1990, which suggested that Iran was responsible for the Pan Am 103 bombing. RX 9.

b. *The Civil Case*

24. On December 12, 1990, the United States District Court overseeing the Pan Am 103 Civil Case granted the Justice Department's motion to quash Pan Am's non-party

subpoenas, including the subpoena to the State Department that was the subject of Respondent's January 31, 1990, memorandum. RX 13. Pan Am then filed a motion for leave to implead the United States as a third-party defendant. BX 4. On December 17, 1990, the United States opposed Pan Am's motion, and on April 24, 1992, the court rejected Pan Am's attempt to implead the United States and refused to permit an action to proceed against the United States. BX 5; RX 23. On July 10, 1992, after an eleven-week jury trial, the plaintiffs in the Civil Case won a judgment holding that Pan Am had engaged in willful misconduct that was a substantial factor in causing the bombing. The amount of the damages was not decided. BX 18 at 4-5. *See also In re Air Disaster at Lockerbie, Scotland*, 811 F. Supp. 89, 90 (E.D.N.Y. 1993).

c. *The Criminal Case*

25. As noted above, on November 13, 1991, the United States indicted two Libyans for planting the bomb that destroyed Pan Am 103. The indictments were returned in the United States District Court for the District of Columbia (*United States v. Ali Al Megrahi*) (hereafter the "Criminal Case"). BX 6; RX 16.

26. On November 24, 1991, the United States and the United Kingdom proposed a joint declaration for United Nations approval, calling for the Libyan government to surrender the two indicted Libyans for trial, to disclose all it knew about the bombing, and to pay appropriate compensation for the bombing. RX 17. On January 21, 1992, the United Nations Security Council adopted a resolution condemning the bombing and urging Libya to cooperate fully in establishing responsibility for the bombing. RX 18. On March 31, 1992, because Libya did not

respond to the United Nations demand, the United Nations called for the imposition of sanctions on Libya. RX 22.

D. *Respondent and HH&R Seek to Represent Libya*

27. On June 15, 1990, Respondent left the State Department to become a partner in the Washington office of HH&R. I Tr. 177-78; Ans. at ¶ 18.

1. *Negotiations with Libya*

28. In late 1992, Graham Wisner, a Washington, D.C. lawyer who knew Respondent, asked Respondent if he was interested in assisting Wisner in representing Libya in connection with legal proceedings in the United States arising from the Pan Am 103 bombing. Ans. at ¶ 20; I Tr. 210; II Tr. 57-58. Respondent replied that he would not defend Libya for anything it had done, but if Libya was looking for a way to satisfy its obligation under the United Nations resolutions, he would be interested in representing Libya for that purpose. I Tr. 210-13.

29. Wisner told Respondent that the Libyans were interested in having Respondent write a proposal concerning his potential representation of Libya. I Tr. 218. Respondent drafted a letter, dated January 7, 1993, proposing a representation of Libya "in connection with ongoing civil and criminal disputes and litigation relating to the destruction of Pan Am 103." BX 7; I Tr. 218. The letter, addressed "To Whom it May Concern," stated that HH&R was prepared to assist "in resolving by consensual negotiations all pending and potential civil and criminal litigation and other proceedings" relating to the Pan Am 103 bombing. BX 7. HH&R proposed to commence work on his representation when Libya placed a retainer of $3 million into HH&R's escrow account in a Swiss bank,

payable to HH&R for its work at the rate of $250,000 a month. *Id.*

30. Respondent delivered this proposal to Wisner, who gave it to "intermediaries" of the Libyan government. I Tr. 218. Respondent also met twice with representatives of the Libyan government in Geneva to discuss the proposed representation. I Tr. 219, 250-51; II Tr. 97-98.

2. *The Representation Agreement*

31. On April 14, 1993, Respondent and a representative of the Libyan government signed two letters, similar in terms to the January 4 letter, that established the agreement by which Respondent and HH&R would represent Libya in connection with civil and criminal litigation relating to the Pan Am 103 bombing. The letters were addressed to "The Committee for the Case of Lockerbie." This committee acted on behalf of the Libyan government and consisted of the Libyan Ambassador to Morocco, the Libyan Ambassador to Tunisia, the Libyan Minister of Foreign Affairs, and the Libyan Chief of Foreigner Security. RX 4; BX 10; II Tr. 78-81.

32. The terms of the April 14 representation agreements specified that HH&R:

> would represent you [sic] committee in connection with on-going civil and criminal disputes and litigation relating to the destruction of Pan Am 103. . . . We are prepared to assist the relevant parties regarding the above incident by investigating the facts and legal proceedings, preparing legal analyses, providing legal advice and proposing legal steps to deal with this matter. Our efforts will not include substantial activities as litigators but rather would be limited to activities associated with agreed upon measures, in-

> cluding consensual resolutions. Measures will be taken only with your prior consent, and without admission of liability.

BX 10. The agreement also stated that HH&R was unwilling to engage in any activities that would require it to register under the Foreign Agents Registration Act (FARA). BX 10. This meant that HH&R would limit its activities to legal work rather than any lobbying on behalf of Libya. I Tr. 219-20; II Tr. 62.

33. The financial terms of the agreement specified that Libya would deposit a $3 million retainer into a mutually agreeable Swiss bank account for one year's work by HH&R. The retainer would be disbursed to HH&R at the rate of $250,000 a month. The representation would begin when the Libyans provided a letter of credit to HH&R's Swiss bank account ensuring payment of the agreed-upon fees and when HH&R confirmed that it had obtained a license from the Treasury Department's Office of Foreign Assets Control (OFAC) permitting HH&R to receive payments from Libya legally. BX 10; I Tr. 219-20.

34. Respondent testified that the two specific objectives of the representation were: 1) to attempt to resolve the extradition request for the two indicted Libyans in a manner acceptable to the United States, the United Kingdom, and the Libyan government; and 2) to seek consensual settlements of the civil litigation arising from the Pan Am 103 bombing in a manner satisfactory to the plaintiffs, their counsel, the court, and the Libyans. I Tr. 213-19; BX 12A; BX 27. Another lawyer at HH&R, Mr. Gerson, described Respondent's contemplated role as "Kissingerian"—achieving a "grand scale" settlement providing

compensation to families of the victims in fulfillment of the United Nations resolutions. I Tr. 118-19.[6]

35. Respondent testified that "acting as Libya's lawyer" he intended to work out an arrangement with the Department of Justice to have the two indicted Libyans produced to an acceptable venue for trial. I Tr. 217; II Tr. 62-63. Respondent thought that the Libyans, the United States, and the United Kingdom might agree that the trial of the Libyans could proceed in a forum other than the United States, such as Scotland. II Tr. 62-63; II Tr. 261. Respondent stated that he specifically declined to represent the two indicted Libyans in the defense of their criminal case or to represent Libya in defending itself in connection with the bombing. I Tr. 93-95, 217-18; BX 27.

36. Respondent also testified that he contemplated Libya making an *ex gratia* payment to the families of the bombing—that is, a payment by Libya without any admission of fault. I Tr. 214-18; II Tr. 63-64; RX 74 at ¶ 5. While the Legal Adviser, Respondent had successfully obtained *ex gratia* payments from Iraq for the families of the servicemen killed or injured on the *USS Stark*, a United States Navy ship that had been attacked by an Iraqui aircraft. I Tr. 183-85; RX 74 at ¶ 5.[7]

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[6] The court reporter incorrectly transcribed the phrase used by Mr. Gerson at the hearing as "kissing Jerry," rather than "Kissingerian." I Tr. 118.

[7] Respondent described the *ex gratia* payment by Iraq in the Stark case:

> You accept the responsibility to pay for the damage without saying that you were liable in a tech—you know, like Iraq did in Stark. Iraq said this was a mistake, we didn't—we wouldn't be—we wouldn't be responsible, *if you had a trial, you wouldn't be able to find us responsible, but we're paying you anyway*; accept responsibility in that sense at least, yes.

I Tr. 214 (emphasis added).

Respondent had in mind a figure of $1 billion as an appropriate *ex gratia* payment from Libya for the Pan Am 103 bombing. II Tr. 63-64. Although Libya was not a party to the Civil Case, Respondent thought that the Civil Case could be a "possible vehicle" for making payments to the families of the victims. II Tr. 64-65. Respondent also knew that Pan Am would seek damages from Libya from the proposed *ex gratia* payment, but Respondent was not contemplating that Libya would agree to make any such payment to Pan Am. II Tr. 64.

E. *Preparations to Represent Libya*

1. *The OFAC License*

37. In preparation for their representation of Libya, Respondent and HH&R took several steps. First, they attempted to obtain the required OFAC license. OFAC administers the economic sanctions imposed on foreign countries by the United States, including 1986 sanctions on Libya. Under those sanctions, any economic transaction with Libya was prohibited unless OFAC granted a specific license to engage in the transaction or the transaction was authorized by a general license because it fit within a general category of acceptable transactions. I Tr. 57-58. Providing legal advice to Libya on the United States legal system was covered by a general license. Receiving payments from Libya for legal services required a specific license. I Tr. 57-59; 62-63.

38. On March 11, 1993, an attorney at HH&R spoke to Richard Newcomb, the director of OFAC, regarding HH&R's possible representation of Libya. Newcomb stated that "lobbying" to settle the Civil Case would not fall within OFAC's general exception for legal services. Because the exact scope of HH&R's Libyan representation was not clear at the time, Newcomb suggested that HH&R

provide a written description of what it intended to do for Libya. BX 8.

39. On April 19, 1993, after Respondent and the Libyan representative signed the representation agreements described in paragraphs 31-33 above, an HH&R attorney advised OFAC in writing that HH&R would be providing "[l]egal services to the Government of Libya in connection with [the Criminal Case and the Civil Case]." BX 11. Respondent and HH&R believed that it could provide such legal services under a general license, but that they needed a specific license to be paid by Libya for their services. II Tr. 67-69; BX 11. HH&R's letter therefore requested a specific license for receipt of payments from Libya for legal services. BX 11.

40. On May 10, 1993, OFAC issued a specific license to HH&R to receive payments of fees and expenses in connection with the Criminal Case, the Civil Case, and any other United States court cases relevant to the Pan Am 103 litigation. OFAC also required HH&R to file a copy of the specific license with "the court." BX 12.

2. *Ethical Issues Facing HH&R*

a. *Mr. Gerson Withdraws From HH&R*

41. Respondent and HH&R were aware of an ethical issue related to their proposed representation of Libya because another attorney at HH&R, Allan Gerson, represented a plaintiff who was seeking compensation from Libya for the Pan Am 103 bombing. I Tr. 237-39. Mr. Gerson, a law professor on leave from his university, had been working at HH&R in an "of counsel" capacity since January 1991. I Tr. 113, 235. On July 1, 1992, Mr. Gerson had written an article in *The New York Times* proposing adoption of a United Nations resolution establishing an international claims commission to administer

compensation by Libya for the families of the Pan Am 103 victims. As a result of his article, two men whose relatives were killed in the bombing, Bruce Smith and Paul Hudson, retained Mr. Gerson and HH&R to seek compensation from Libya through the establishment of the United Nations commission. BX 6B; BX 6D; I Tr. 107-10, 130-32. By early 1993, Mr. Gerson began contemplating suing Libya in the United Kingdom on behalf of his clients. I Tr. 132.

42. On January 4, 1993, Respondent told Mr. Gerson that Respondent and HH&R were considering representing Libya in connection with the Pan Am 103 bombing. Respondent informed Mr. Gerson that they should not discuss Mr. Gerson's representation of the Pan Am 103 plaintiffs because Mr. Gerson "might be on the other side" if Respondent were retained by Libya. I Tr. 111-12. Respondent believed that it would have been an ethical conflict for him and HH&R to represent Libya with regard to payment of compensation to the relatives of the victims while at the same time another HH&R lawyer was considering a lawsuit against Libya on behalf of the relatives of the victims. I Tr. 237-38; BX 39 at 2. Charles Scherer, the managing partner of HH&R, agreed that this situation raised a conflict under the District of Columbia ethics rules. II Tr. 235-36.

43. On March 24, 1993, Mr. Scherer and Robert Sisk, the chairman and senior litigating partner of HH&R, informed Mr. Gerson that an ethical conflict was developing because of HH&R's impending representation of Libya. I Tr. 115-20; II Tr. 234-35. Mr. Scherer testified that Mr. Gerson was told that he would have to leave HH&R if it were retained by Libya. II Tr. 235. Mr. Gerson testified that he understood that if the firm agreed to represent Libya, he would either have to withdraw from rep-

resenting the Pan Am plaintiffs or leave the firm. I Tr. 120.

44. On April 16, 1996, after the representation agreements between Libya and HH&R were signed, Mr. Gerson wrote a letter to HH&R announcing his intention to withdraw from his position with the firm and return to teaching full-time. BX 10A. This letter confirmed that Mr. Gerson was continuing his representation of Mr. Smith, one of the Pan Am plaintiffs. *Id.;* I Tr. 125-26.[8] Mr. Smith subsequently signed a letter terminating any relationship between himself and HH&R, confirming that he wanted to be represented by Mr. Gerson, and consenting to HH&R's representation of Libya. RX 35.

b. *Rule of Professional Conduct 1.11(a)*

45. John Townsend, the managing partner of the Washington office of HH&R, assisted in HH&R's preparations to represent Libya. HH&R had a firm-wide ethics committee, and a Washington HH&R partner, Bill Stein, was a member of that committee. Mr. Townsend consulted with Mr. Stein concerning the ethical rules applicable to HH&R's proposed representation of Libya. According to Mr. Townsend, sometime after HH&R and Respondent agreed in April 1993 to represent Libya, Respondent asked Mr. Townsend for a copy of any ethics rule applicable to the proposed representation. Mr. Townsend consulted with Mr. Stein, who said that Respondent should keep in mind Rule 1.11 as well as Rule 1.9.[9] Respondent was given a copy of both rules. II Tr. 252-59.

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[8] Mr. Gerson no longer represented the other plaintiff, Mr. Hudson. I Tr. 110-11.

[9] Rule of Professional Conduct 1.9 prohibits a lawyer who formerly represented a client in a matter from representing another person in the same or a substantially related matter if the person's interests are materially adverse to the former client, unless the former client consents.

46. Respondent testified at the hearing that he did not specifically recall discussing Rule 1.11 with Mr. Townsend, Mr. Stein, or anyone outside the firm to determine whether this rule prevented Respondent from representing Libya. Respondent said, however, that the issue "certainly came up." II Tr. 116-22, 268-70. He testified that he consulted with members of the firm about the ethics issues surrounding the proposed representation of Libya, but he did not "systematically" address whether his prior service as the Legal Adviser precluded his representation of Libya under Rule 1.11. Respondent testified that much more important to him was the question whether he had learned any "confidential information" as Legal Adviser that might have to be revealed during his representation of Libya, and because he believed he had not learned such information, he "thought [Rule 1.11] was clearly inapplicable" to his representation of Libya. II Tr. 109, 118-21. Respondent said he did not think that Rule 1.11 was "a major issue" or a "real issue" concerning his proposed representation. II Tr. 120-21.[10]

47. Respondent did not consult with the State Department before undertaking the Libyan representation to determine if it had any objection to his representing Libya. He also did not check with the State Department to determine whether he had worked on any matters while in the government that arguably could be considered substantially related to his representation of Libya. II Tr. 83. Respondent said he refrained from doing so before the

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[10] Respondent stated at the hearing:

> So the issues we thought were the real ethics issue were dealt with on paper and systematically, but this one wasn't because we did not think it was a major issue. What I didn't do was hire a public relations firm.

II Tr. 121.

representation began because he knew his representation of Libya would create a "bombshell," and he was not confident that Libya would follow through with its intent to hire him. Libya had courted other lawyers in the past but had not retained them. II Tr. 107-10. Moreover, according to Respondent, he believed that the limitation he placed on the scope of the representation—seeking consensual resolutions only and not helping Libya avoid liability—made everything he learned at the State Department irrelevant, since he was proceeding on the assumption that Libya was responsible for the bombing. II Tr. 108.

48. HH&R did take action to "wall off" Peter Flory, a law clerk at the firm, from any involvement in the Libyan representation. II Tr. 120-23. From January 1992 to January 1993, Flory had served as the Associate Coordinator in the State Department's Office on Counterterrorism. This office helped coordinate the work of federal agencies, including the FBI and the Justice Department, in connection with counterterrorism issues worldwide. According to Mr. Flory, the Office on Counterterrorism was the "lead office in developing United States policy with regard to the bombing of Pan Am 103." During the time Mr. Flory worked in that office, he was involved in "deliberations regarding the Pan Am 103 bombing, working directly in support of the development and implementation of U.S. diplomatic and other policy with regard to Libya's sponsorship of the attack." Flory Affidavit at ¶ 4. Because Mr. Flory had been privy to classified and confidential information connecting Libya to the bombing, HH&R decided he should not be involved in the firm's representation of Libya. *Id.* at ¶ 5. According to Mr. Townsend, the managing partner of HH&R's Washington office, he asked Mr. Flory to send a letter to the State Department confirming that he would not be

involved in HH&R's representation of Libya "so that there would be no question of concern at State that any classified information that was lurking in Peter [Flory's] mind was being applied to this representation." II Tr. 257-58.

F. *The Representation of Libya Begins*

49. On June 24, 1993, HH&R received a letter of credit from Bank Credit Suisse for $2.5 million, ensuring payment of Libya's legal fees. BX 14. On June 30, 1993, HH&R sent a statement billing Libya $250,000 for professional "services and advice" to be performed by Respondent and HH&R for Libya during the month of July 1993. BX 15.

50. On July 1, 1993, HH&R received $250,000 in its Geneva bank account from Libya. Respondent and HH&R considered its representation of Libya as beginning on July 1. BX 16; I Tr. 225; II Tr. 24.

51. Respondent and HH&R took several initial steps as part of its representation of Libya. Various research projects were assigned to HH&R attorneys, such as compiling docket entries in the Pan Am 103 Civil Case, collecting reported decisions arising from litigation relating to the bombing, surveying United States practice regarding trials of international fugitives, surveying relevant treaties between the United States and Libya, and researching procedures for filing an OFAC license with a court. BX 18; RX 38; RX 42; II Tr. 70-77, 94. Respondent and other HH&R lawyers also met to discuss possible approaches to the resolution of the Criminal and Civil Cases. RX 38; RX 40; RX 41; RX 42. In addition, Respondent wrote to a member of the Libyan committee to request relevant documents from Libya. RX 36.

52. Although HH&R had obtained a specific license from OFAC to receive payments for its legal services, there was still some question whether HH&R's contemplated legal representation exceeded the services permitted under OFAC's general license. I Tr. 80; II Tr. 69-70; BX 16. Moreover, HH&R was concerned about having to file the specific license with the court overseeing the Civil Case, as required by the license. Libya was not a named party in the Civil Case, and HH&R thought that filing the specific license with the court might be construed as waiving the sovereign immunity of Libya from a lawsuit in the United States. II Tr. 260; BX 13A; BX 17. As a result, on July 1, 1993, HH&R wrote to OFAC requesting a meeting to discuss the terms of the OFAC license. BX 16; I Tr. 80; II Tr. 69-70.

53. On July 12, 1993, HH&R issued a press release announcing that it had "been retained by the Government of Libya to assist it in seeking a consensual resolution of litigation arising from the Pan Am 103 disaster." BX 19. The release quoted Respondent as stating: "This retention does not mean that Libya or either individual defendant has decided to appear in the criminal or civil cases. Hughes, Hubbard & Reed will advise the Government of Libya with a view to developing solutions for the differences which exist in these litigations, and which are acceptable to all parties; we will not litigate actively in defense of Libya or the individual defendants." *Id.*

54. The release provoked extremely negative public reaction, including an editorial on July 14 in *The Washington Post* comparing Respondent's representation of Libya to the movie "Indecent Proposal." BX 20; BX 24. On July 14, in response to media inquiries, a State Department spokesperson stated that the State Department would not comment on whether Respondent's representation of Libya created a conflict of interest. BX 21; Ans. at ¶ 32.

55. On July 15, 1993, Respondent and another HH&R lawyer met with the Director of OFAC and other OFAC officials. BX 29; I Tr. 227-29. The OFAC officials advised Respondent that a general OFAC license permitted HH&R to provide Libya with legal advice and to represent Libya concerning potential extradition of the two indicted Libyans. Because Libya was not a party to any proceeding in the United States, the general license did not permit HH&R to pursue settlement negotiations on behalf of Libya. A specific license was needed for that purpose. I Tr. 68-75, 90-98, 228; BX 26A; BX 26B; BX 26C. Respondent testified that he stated at the meeting that he intended to contact the lawyer representing the families of the victims about the possibility of commencing settlement negotiations, and if that process looked like it was going to proceed, he would apply for another specific license as required by OFAC. I Tr. 228-29. On July 15, 1993, Respondent wrote to a lawyer for the Pan Am plaintiffs to describe Respondent's role in representing Libya. BX 28; II Tr. 65-66.

56. Also on July 15, 1993, Respondent wrote to the State Department's Legal Adviser, Conrad Harper, expressing displeasure with the statement attributed to the State Department official concerning Respondent's representation of Libya. Respondent's letter to Mr. Harper described the proposed scope of his and HH&R's representation of Libya and stated that Respondent did not see any legal or ethical impediment to it. The letter asked for the State Department's appraisal of this position. BX 25. Later that day, after his meeting with OFAC officials, Respondent wrote to Mr. Harper again to clarify the nature of HH&R's representation of Libya and to ask for a prompt reply about the propriety of the representation. II Tr. 6-7; BX 27.

G. *Respondent and HH&R Withdraw from Representing Libya*

57. On July 16, 1993, Respondent and HH&R withdrew from representing Libya. II Tr. 7; BX 30; RX 46; RX 47. They issued a press release announcing the withdrawal and stating that the public perception of HH&R's undertaking and the reaction of government authorities were so negative that HH&R concluded that it could not effectively carry out the representation. *Id.* Respondent testified that the public reaction and the inaccurate portrayal that HH&R was trying "to get Libya off the hook" had caused the families of the victims to react unfavorably. I Tr. 231-34. In addition to the families' reaction, a hostile response from United States government officials, including Senators and State Department officials, made Respondent and HH&R conclude they could not reach consensual resolutions of the Civil and Criminal Cases and therefore should withdraw. I Tr. 234; II Tr. 7-8, 243-44. Respondent stated that he and HH&R withdrew because "we didn't think we'd be able to do the job effectively." II Tr. 122.

58. HH&R subsequently applied to OFAC for a specific license to return the $250,000 payment it had received from Libya for services rendered during July 1993. That license was granted, and HH&R returned the $250,000 to Libya. I Tr. 98; II Tr. 112; BX 31; BX 32; BX 35.

H. *Investigation into Respondent's Conduct*

59. In response to a request from United States Senator Carl Levin, the Office of Government Ethics (OGE) reviewed whether Respondent's conduct violated any applicable post-employment restrictions on government employees, including 18 U.S.C. § 207. This statute prohibits

a former federal government employee from communicating or appearing before a federal government agency, with the intent to influence the government, in connection with a particular matter in which the former official participated personally and substantially when in the government. RX 55; BX 34; BX 45; BX 46. OGE concluded that because Respondent had not yet contacted any government officials with the intent to influence them in connection with his Libyan representation, he had not violated this statute. OGE made no judgment on the hypothetical question whether Respondent would have violated the law if he had continued the representation and made substantive communications to executive branch officials on behalf of Libya. BX 46.

60. The United States Attorney's Office for the District of Columbia also investigated the circumstances surrounding HH&R's application for an OFAC license but closed its investigation without bringing any charges. RX 58; RX 70.

61. On July 22, 1993, as a result of his review of press articles about Respondent's representation of Libya, Bar Counsel began an investigation into Respondent's conduct. Bar Counsel sent Respondent a letter asking for his response to the allegation that his representation of Libya may have violated the District of Columbia Rules of Professional Conduct, particularly Rule 1.11(a). RX 50.

62. In response to these investigations, on August 18, 1993, Respondent's counsel sent to the State Department a draft of two paragraphs describing Respondent's recollection of the matters on which he worked while the Legal Adviser that related to the Pan Am 103 bombing. Respondent's counsel asked whether these recollections were accurate. BX 37. According to this submission, Respond-

ent recalled his diplomatic exchange with the country other than Libya and recalled that he either attended or knew about the Baker/Plaskett meeting. *Id.* On August 20, 1993, the State Department's Legal Adviser, Mr. Harper, responded that the State Department was not in a position to verify the accuracy of Respondent's submission. Mr. Harper noted, however, that Respondent had signed the January 31, 1990, memorandum concerning the State Department's response to Pan Am's non-party subpoena. BX 38. Respondent testified that he had forgotten about that memorandum until Mr. Harper's letter reminded him of it. I Tr. 198-99; II Tr. 110-11; BX 41.

63. Over the next two years, Respondent, his counsel, and Bar Counsel engaged in an extensive series of discussions and correspondence addressing whether Respondent's conduct violated Rule of Professional Conduct 1.11(a). On January 27, 1994, Bar Counsel issued a proposed informal admonition alleging that Respondent had violated Rule 1.11(a). RX 62. After further discussions between Bar Counsel and Respondent's counsel, on June 20, 1994, Bar Counsel declined to vacate the informal admonition. RX 66. Respondent rejected the informal admonition and asked Bar Counsel to consider the matter further. Bar Counsel agreed to do so. RX 67; RX 69; RX 71; RX 72; RX 73; BX 42; BX 43.

64. On April 18, 1995, Bar Counsel and Respondent's cousel entered into a diversion agreement, pursuant to Section 8.1 of Rule XI of the District of Columbia Court of Appeals' Rules Governing the Bar (D.C. App. R. XI). Under this agreement, Respondent was to perform no fewer than 100 hours of service with the Legal Aid Society of the District of Columbia. RX 75.

65. Pursuant to Section 8.1(c), D.C. App. R. XI, the diversion agreement was subject to approval by a

member of the District of Columbia Board on Professional Responsibility. The agreement was disapproved by the Board Chair, and Respondent's attempt to appeal the disapproval to the full Board was denied by the Board Chair. *See* Order of the Chair, D.C. Board on Professional Responsibility, Bar Docket No. 280-93 (June 21, 1995). On July 26, 1995, Bar Counsel filed a one-count Specification of Charges alleging that Respondent violated Rule 1.11(a). This is the charge before the Hearing Committee.

III. CONCLUSIONS OF LAW

In this section, we first describe the legal standards applicable to District of Columbia Rule of Professional Conduct 1.11(a), then examine the application of these standards to Respondent's conduct.

A. *The Applicable Legal Standards*

Rule of Professional Conduct 1.11(a), often called the "revolving door rule," is particularly important in the District of Columbia because it addresses a recurring ethical issue facing lawyers who move from government to private employment. *See Revolving Door,* 445 A.2d 615 (D.C. 1982) (en banc) (per curiam). Rule 1.11(a) states in pertinent part:

> A lawyer shall not accept other employment in connection with a matter which is the same as, or substantially related to, a matter in which the lawyer participated personally and substantially as a public officer or employee.

Therefore, the essential elements to show a violation of Rule 1.11(a) are:

(1) a government lawyer

(a) participates as a public employee in a matter,

(b) both personally and substantially;

(2) followed by the lawyer's leaving the government and accepting employment in another matter that is

(a) the same as or

(b) substantially related to the original matter.

1. *Definition of Matter*

The term "matter," the first critical element in Rule 1.11(a), is defined in Rule 1.11(g):

> As used in this rule, a "matter" is any judicial or other proceeding, application, request for ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties.

This definition was modeled after the corresponding language in the Ethics in Government Act, 18 U.S.C. § 207. The definition of matter was first incorporated into the District of Columbia disciplinary rules in 1982 by the Court of Appeals in *Revolving Door*, 445 A.2d at 618. In this decision, the Court amended Disciplinary Rule (DR) 9-101(b) of the Code of Professional Responsibility,[11] the predecessor rule to Rule 1.11(a), and also defined the term "matter." In 1991, when Rule 1.11

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[11] DR 9-101(b) stated:

> A lawyer shall not at any time accept private employment in connection with any matter in which he or she participated personally and substantially as a public officer or employee, which includes acting on the merits of a matter in a judicial capacity.

replaced DR 9-101(b), the Court included in Rule 1.11 the definition of matter that it had articulated in *Revolving Door*.[12]

The leading District of Columbia care interpreting the revolving door disciplinary rule, and the case cited prominently in the Comments to Rule 1.11, is *Brown v. District of Columbia Board of Zoning Adjustment*, 486 A.2d 37 (D.C. 1984) (en banc) (hereafter "*Brown*)". In *Brown*, the Court noted with approval the characterization of a matter by the American Bar Association's Committee on Professional Ethics and Grievances, which described a matter as "a discrete and isolatable transaction *or set of transactions* between identifiable parties." *Id.* at 42, n.4 (emphasis in original) (quoting *Committee for Washington's Riverfront Parks v. Thompson*, 451 A.2d 1177, 1188 (D.C. 1982)).[13]

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[12] In *Committee for Washington's Riverfront Parks v. Thompson*, 451 A.2d 117 (D.C. 1982), the Court had implicitly concluded that matters would be considered the same for purposes of DR 9-101(b) if they were "substantially related." When the Rules of Professional Conduct were adopted in 1991, the Court of Appeals made explicit in Rule 1.11(a) that a subsequent representation was prohibited if it related to the same *or* substantially related matters.

[13] In *Committee for Washington's Riverfront Parks*, 451 A.2d at 1188, the Court quoted at length the description of "matter" by the ABA's Committee on Ethics and Professional Responsibility:

> Although a precise definition of "matter" as used in the Disciplinary Rule is difficult to formulate, the term seems to contemplate a discrete and isolatable transaction or set of transactions between identifiable parties. Perhaps the scope of the term "matter" may be indicated by examples. The same lawsuit or litigation is the same matter. The same issue of fact involving the same parties and the same situation or conduct is the same matter. By contrast, work as a government employee in drafting, enforcing or interpreting government or agency procedures, regulations, or laws, or in briefing abstract principles of law, does not disqualify the lawyer under DR 9-101(b) from subsequent private employment involving the

The official Comments to Rule 1.11 also state that the definition of matter "encompass[es] only matters that are particular to a specific party or parties. The making of rules of general applicability and the establishment of general policy will ordinarily not be a 'matter' within the meaning of Rule 1.11." *See* Comment 3.[14]

2. *Definition of Personal and Substantial Participation*

The second essential element necessary for a violation of Rule 1.11(a) is that the government lawyer must participate in a government matter "personally and substantially." We found no case in the District of Columbia interpreting the meaning of personal and substantial in the context of a disciplinary proceeding. However, the regulations implementing 18 U.S.C. § 207 provide some guidance on this issue:

> "Substantially" means that the employee's involvement must be of significance to the matter, or form the basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue.

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same regulations, procedures, or points of law; the same "matter" is not involved because there is lacking the discrete, identifiable transactions or conduct involving a particular situation and specific parties. [ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 at 6 (1975) (footnotes omitted).]

[14] As the United States District Court for the District of Columbia stated when interpreting Disciplinary Rule 9-101, the word "particular" emphasized that the disciplinary rule "applies to a specific case or matter and not to a general area of activity." *Laker Airways Ltd. v. Pan American World Airways*, 103 F.R.D. 22, 34 (D.D.C. 1984) (Greene, J.) (quoting B. Manning, *Federal Conflict of Interest Law* 55 (1964)).

5 C.F.R. § 2637.201(d)(1). However, "the single act of approving or participation in a critical step may be substantial if the act is of significance to the matter." *Id.*

In an opinion interpreting Disciplinary Rule 9-101, the D.C. Bar Legal Ethics Committee opined that a government lawyer's participation in the matter was personal and substantial because it was "direct, extensive, and substantive, not peripheral, clerical, or formal." Opinion No. 84 (1980).

3. *Test for Substantial Relationship*

The third essential element for a violation of Rule 1.11(a) is that the matter in which the government lawyer participated must be "substantially related" to the subsequent matter in which he or she represents a private client. The methodology for determining whether two matters are substantially related was the subject of extended discussion by the District of Columbia Court of Appeals in *Brown.* In that case, the Court noted that the substantial relationship test originated in litigation between private parties in the context of a motion to disqualify counsel on the grounds that a lawyer had unethically switched sides between private litigants. 486 A.2d at 42. The Court cited to *T.C. Theatre Corp. v. Warner Brothers Pictures, Inc.*, 113 F. Supp. 265, 268-69 (S.D.N.Y. 1953), *aff'd*, 216 F.2d 920 (2d Cir. 1954), a case in which the central purpose of the ethical prohibition against side-switching was described as preventing a private lawyer who may have received confidential information from using it against the client in a subsequent representation.

The Court described the test that was generally used to determine if two matters were substantially related in private side-switching cases:

> Initially, the trial judge must make a factual reconstruction of the scope of the prior representation. If the factual contexts overlap, the court then has to determine whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those prior matters. Finally, if such information apparently was available to counsel in the prior representation, the court has to determine whether it is relevant to the issues raised in the litigation pending against the former client. If all three conditions are met, the matters will be substantially related and thus deemed the same for conflict of interest purposes with doubts to be resolved in favor of disqualification.

Id. at 49 (citations and footnotes omitted) (quoting *Westinghouse Electric Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 225 (7th Cir. 1978)).

The *Brown* Court then examined the revolving door situation when a lawyer leaves the government to enter private practice. The Court concluded that the revolving door rule, like the side-switching rule, was designed to address at least a reasonable possibility that some specifically identifiable impropriety would occur. 486 A.2d at 48. The Court emphasized that the critical issue was whether the attorney had the opportunity while participating in a matter in the government to gather specific information that the attorney could not otherwise have gained and that could be used on behalf of a private client in a later proceeding. The information of concern was not general data, or general agency expertise and contracts, but specific information. *Id.* at 48-49.

The *Brown* Court concluded that the *Westinghouse* private side-switching test should be broadened in a government revolving door case for several reasons. First,

because government attorneys may have had access to more kinds of information than private attorneys typically do, there is a greater potential for misuse of government information in the revolving door situation. Second, the public generally is more concerned about government improprieties than private improprieties, and the appearance problem is more severe because the public is likely to be more critical of the potential abuse of information by a government lawyer entering private practice. Third, the complainant in a revolving door situation may not have specific knowledge of the information gathered by the government lawyer. *Id.* at 48.

As a result, the Court in *Brown* articulated a broad test for determining whether a substantial relationship existed between two matters in revolving door cases:

> Accordingly, in cases where the complainant's evidence shows that the factual contexts of the two or more transactions overlap in such a way that a reasonable person could infer that a former government attorney may have had access to information legally relevant to, or otherwise useful in, the subsequent representation, we conclude that the complainant will have established a prima facie showing that the transactions are substantially related. The burden of producing evidence that no ethical impropriety has occurred will then shift to the former government attorney, who must rebut complainant's showing by demonstrating that he or she could not have gained access to information during the first representation that might be useful in the later representation. Absent sufficient rebuttal, the complainant will have carried the burden of persuasion as the moving party.

486 A.2d at 49-50 (footnotes omitted).

The Court in *Brown* stressed that the former government lawyer could not state as rebuttal evidence that no useful information was in fact received during the government representation. The Court declared that if it was reasonable to infer that the lawyer may have received useful information during the government representation, there would be a conclusive inference that useful information was in fact received. 486 A.2d at 50. The lawyer's rebuttal information had to focus instead on the scope of the representation involved in each matter and not the actual receipt of information:

> To rebut a complainant's prima facie showing of substantial relationship, the former government attorney must produce evidence elaborating on the nature of the two matters so as to make it "clearly discernible" that the issues involved are unrelated and the court should not infer the existence of useful government-developed information.

Id. at 50, n.18 (quoting *Westinghouse Electric Corp.*, 588 F.2d at 224).

The Court also made clear that it would not inquire into the specific information or confidences disclosed during the government representation, or whether that information was used by the former government lawyer in private practice. The Court noted that it would not require proof that an attorney actually had access to or received privileged information in the prior case. "Only in this matter can the lawyer's duty of absolute fidelity be enforced and the spirit of the rule relating to privileged communications be maintained." *Brown*, 486 A.2d at 42, n.5 (quoting *T.C. Theatre Corp.*, 113 F. Supp. at 268-69).[15]

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[15] In *Brown*, the facts at issue involved two lawyers who had previously worked in the D.C. Office of Corporation counsel han-

4. *Application of Brown Methodology in Disciplinary Proceeding*

When the District of Columbia Court of Appeals adopted the Rules of Professional Conduct in 1991, it also adopted the Comments to the Rules. *See* Preface to Rules of Professional Conduct (adopting Rules *and* Comments). Comment 4 to Rule 1.11 contains an explicit description of the *Brown* methodology for analyzing the substantial relationship element of Rule 1.11 (a).[16]

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dling zoning applications on a particular piece of property that was owned by a real estate developer. While in the government, the two lawyers worked on two transactions involving the property—the developer's attempt to increase the height limitation on the property and the developer's attempt to mix residential and commercial uses on the property. When the two lawyers left the government, they were retained by the same developer to handle another zoning issue involving the same property—the developer's application for a special zoning exception to increase the number of below-grade parking spaces permitted on the property. 486 A.2d at 40-41. In deciding a motion to disqualify the two lawyers from representing the developer, the Court applied the methodology described above to determine whether the matters were substantially related. The Court concluded that the lawyers could not have gained any information in the earlier proceedings that would have aided them in their subsequent representation, and therefore the matters were not substantially related. *Id.* at 53, 58-59.

16 Comment 4 states:

> The leading case defining "substantially related" matters in the context of former government employment is *Brown v. District of Columbia Board of Zoning Adjustment*, 486 A.2d 37 (D.C. 1984) (en banc). There the D.C. Court of Appeals, en banc, held that in the "revolving door" context, a showing that a reasonable person could infer that, through participation in one matter as a public officer or employee, the former government lawyer "may have had access to information legally relevant to, or otherwise useful in" a subsequent representation, is prima facie evidence that the two matters are substantially related. If this prima facie showing is made, the former government lawyer must disprove any ethical impropriety by showing that the lawyer "could not have gained

Respondent argues that the *Brown* Court was interpreting the disciplinary rules in a motion to disqualify counsel, and that the *Brown* test cannot be applied in a disciplinary proceeding, which is quasi-criminal in nature. *See In re Ruffalo*, 390 U.S. 544, 550-51 (1968). According to Respondent's argument, the *Brown* test, with prima facie inferences and shifting burdens, violates Board on Professional Responsibility Rule 11.4, which requires Bar Counsel to prove a disciplinary violation by a "clear and convincing standard," and, further, it violates due process standards by shifting burdens to a Respondent in a disciplinary proceeding. Respondent also contends that the Comments to Rule 1.11 explain the source of the term "substantially related" but do not endorse the application of the *Brown* test in a disciplinary proceeding.

While Respondent's arguments are not without force, we agree with Bar Counsel that the Comments to the Rules suggest that the Court intended the *Brown* methodology to apply in a disciplinary proceeding. First, if the Comments were intended merely to explain the *origin* of the term "substantially related," as Respondent suggests, the Comments that were adopted by the Court could have easily limited the *Brown* test to non-disciplinary proceedings. They do not. The Comments specifically

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access to information during the first representation that might be useful in the later representation." *Id.* at 49-50. In *Brown* the Court of Appeals announced the "substantially related" test after concluding that, under former DR 9-101(B), *see* "Revolving Door," 445 A.2d 615 (D.C. 1982) (en banc) (per curiam), the term "matter" was intended to embrace all matters "substantially related" to one another—a test that originated in "side switching" litigation between private parties. *See* Rule 1.9, Comment [2]; *Brown*, 486 A.2d at 39-40 n.1, 41-42 & n.4. Accordingly, the words "or substantially related to" in paragraph (a) are an express statement of the judicial gloss in *Brown* interpreting "matter."

state: "If this prima facie showing is made, the former government lawyer must disprove any *ethical* impropriety . . . ," indicating that the test applies in disciplinary proceedings as well. *See* Comment 4 to Rule 1.11 (emphasis added).

Moreover, we do not believe that the *Brown* test shifts from Bar Counsel the ultimate burden of proving by clear and convincing evidence all the elements of a violation of Rule 1.11(a). Bar Counsel must show by clear and convincing evidence that the factual contexts of the two matters overlap and that it is reasonable to infer that a government lawyer may have gained access to confidential information legally relevant or useful in the subsequent representation. Respondent may then come forward with evidence that he could not have gained access to any information that was useful or relevant. If Respondent produces such evidence, Bar Counsel must persuade the decision-maker, by a clear and convincing standard, that it is reasonable to conclude that the lawyer had access to information in the government that was legally relevant to or otherwise useful in a subsequent representation. To protect the sanctity of client confidences imparted to the government lawyer, the disciplinary process does not, and should not, inquire into the specific information imparted to a former government lawyer. But Bar Counsel retains the ultimate burden of proving that the government lawyer had access to information that would be useful in the subsequent representation. *Derrickson v. Derrickson*, 541 A.2d 149, 151-52 (D.C. 1988).[17]

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[17] It also is not clear what test Respondent advocates for determining whether two matters are substantially related. The *Westinghouse* test does not shift burdens but, to preserve the sanctity of information given to the former government lawyer, it also requires inferences of what information was imparted to the

B. *Respondent's Conduct*

Although Bar Counsel does not delineate in consistent terms the precise formulation of the "matter" or "matters" in which Respondent participated personally and substantially as a government lawyer, we believe there were at least two such matters: 1) the United States government's 1986 decision to bomb Tripoli in retaliation for Libyan terrorism; and 2) the establishment of culpability for the 1988 Pan Am 103 bombing, including the government's investigation and the ensuing litigation concerning the bombing. As to the first matter, we do not believe Bar Counsel showed that it was substantially related to Respondent's representation of Libya. As to the second, we find that Respondent did participate personally and substantially in that matter while in the government, and that matter was substantially related to his subsequent representation of Libya. We address these two areas in turn.[18]

1. *The Tripoli Bombing*

As a procedural defense, Respondent argues that Bar Counsel should be barred from relying on Respondent's participation in the 1986 decision to bomb Tripoli because this theory and the evidence supporting it were not included in Bar Counsel's January 27, 1994, proposed informal admonition, which Respondent rejected. *See* RX

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government lawyer. Moreover, we would reach the same conclusions in this proceeding if the *Westinghouse* test were applied.

[18] As an initial issue, however, we do not agree with Respondent's assertion that it was an abuse of discretion under D.C. App. R. XI for the Chair of the Board on Professional Responsibility to disapprove the diversion agreement between Bar Counsel and Respondent. Nor does the rule require the Chair to submit an appeal of that disapproval to the full Board prior to a hearing. *See* D.C. App. R. XI, Section 8.1.

62; I Tr. 4-8; Respondent's Brief at 19, n.8, 45; Respondent's Amended Answer, Ninth Affirmative Defense. Respondent bases this argument on Board Rule 6.3, which states that Bar Counsel "may not add any *charge* to the petition arising out of the same circumstances that Bar Counsel was aware of at the time of the investigation, which *charge* was not included in the original informal admonition (emphasis added)."

Bar Counsel added no new *charge* to the one included in the informal admonition. Rule 1.11(a) was the charge referenced in the informal admonition and the only charge that Bar Counsel included in the Specification of Charges and advanced at the hearing. Board Rule 6.3 does not prevent Bar Counsel from advancing additional evidence or theories showing that Respondent's conduct may have violated the same rule that was the subject of the informal admonition.[19]

As to the substantive issue, there is no dispute that Respondent participated personally and substantially in the 1986 decision by the United States government to bomb Tripoli in retaliation for Libya's terrorist acts. Respondent learned of the evidence linking Libya to specific terrorist acts, such as the bombing of the Rome and Vienna airports and the April 1986 bombing of the Berlin discotheque, and Respondent participated in the interagency group of high-level government lawyers who provided advice to government officials on the sufficiency of the evi-

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[19] We also note that, in the rejected informal admonition, Bar Counsel alluded to Respondent's participation in the 1986 decision to bomb Libya but stated that "for present purposes" it was unnecessary to determine if that participation would independently have precluded Respondent's representation of Libya under the ethical rules. RX 62. It is neither unfair nor contrary to Board Rule 6.3 for Bar Counsel to include the additional theory and evidence when the matter proceeds to a hearing after the informal admonition is rejected.

dence connecting Libya to the attacks and the legal basis for a retaliatory bombing.

Respondent argues that this conduct, which he describes as advising on national security actions, may not fit within the definition of a "particular matter" in Rule 1.11(g). *See* Respondent's Brief at 61, n.41. We disagree. These issues involved a "claim, controversy . . . charge, accusation . . . or other particular matter involving a specific party or parties." *See* Rule 1.11(g). He participated in more than general policy issues of national security; he participated in a specific controversy as to whether a retaliatory strike was legally justified in response to specific Libyan acts. This was a particular matter within the scope of the rule.

We agree with Respondent, however, that Bar Counsel did not show that the matter involving the decision to bomb Tripoli in 1986 for specific acts of Libyan terrorism was part of the same set of transactions as a later act of terrorism, the Pan Am 103 bombing in 1988. Nor did Bar Counsel prove that the factual contexts of the 1986 terrorism and the Pan Am 103 bombing overlapped, other than to argue that they all involved a pattern or practice of recurrent acts of Libyan terrorism. There is nothing in the record demonstrating that the 1988 Pan Am 103 bombing was related to the earlier acts of Libyan terrorism or was caused by the United States retaliatory bombing of Tripoli in 1986. Bar Counsel speculated that they were related, because they involved the same parties—Libya and the United States—and involved Libyan terrorism. But they were separate acts, involving different facts, separated by several years.

Moreover, we cannot reasonably infer that any specific information Respondent learned in 1986 when advising as to the appropriate response to Libyan terrorism would

have been useful in or legally relevant to his representation of Libya concerning a different act of terrorism in 1988. *See Brown*, 486 A.2d at 49-50. In 1986, Respondent did not learn anything about Libya's planning of the Pan Am 103 bombing. Nor did Bar Counsel point to any other *specific* information that Respondent would have learned in 1986 that would have been useful or relevant to his representation of Libya. Respondent undoubtedly learned in 1986 general information about Libyan terrorism and its methods of operation. This information is equivalent to expertise about a general area, not specific information about a particular matter. *Id.* at 48. *See also Laker Airways*, 103 F.R.D. at 34 (disciplinary rule applies to a specific case or matter and not to a general area of activity). Respondent's general knowledge, or specific information about other acts of Libyan terrorism, would not preclude him from subsequently representing Libya concerning a separate act, occurring several years later, with no demonstrable connection to the earlier acts.

Thus, we do not believe that Rule 1.11(a) prevented Respondent from representing Libya concerning the Pan Am 103 bombing simply because of his participation in the government's response to earlier acts of Libyan terrorism. For example, if Respondent had left the State Department in 1987, rather than in 1990, thereby learning nothing about the specifics of the investigation into the 1988 Pan Am 103 bombing and the United States government's response to it, the ethical rules would not have prevented him from representing Libya concerning the Pan Am 103 bombing. Similarly, Respondent's participation in the United States government's 1986 response to acts of Libyan terrorism does not form a sufficient predicate for preventing him from representing Libya concerning a later and separate act of terrorism, even though he

was still the Legal Adviser when the later act occurred and was investigated. The violation, if one existed, depended on Respondent's actions concerning the Pan Am 103 bombing, not earlier acts of Libyan terrorism.

2. *The Pan Am 103 Bombing*

On the other hand, we conclude that Respondent did participate personally and substantially while at the State Department in the response to the Pan Am 103 bombing, including the government's investigation and the establishment of liability for it. We also conclude that this matter was substantially related to his later representation of Libya and therefore Respondent violated Rule 1.11(a).

First, as noted above, a particular matter may be a discrete and isolatable transaction or *set of transactions. See Brown*, 486 A.2d at 42, n.4; *Committee for Washington's Riverfront Parks*, 451 A.2d at 1188. Rule 1.11 defines a particular matter as broader than a single judicial proceeding or request for a ruling; it also encompasses a "claim, controversy, investigation, charge . . . or other particular matter involving a specific party or parties." *See* Rule 1.11(g). Here, the government's investigation and the establishment of culpability for the Pan Am 103 bombing, both criminally and civilly, were such an isolatable set of transactions involving a particular act and specific parties. It related to a claim, controversy, investigation, or particular matter arising out of the same situation and involving the same parties (the families of the victims, Pan Am, the United States government, and the unknown culprits). Thus, the claim, controversy, or investigation concerning who was responsible and liable for the bombing related to "the same issue or act involving the same parties and the same situation or conduct"—not "a general interpretation of agency policies or laws."

Committee for Washington's Riverfront Parks, 451 A.2d at 1188.

Second, Respondent's involvement in this matter while in the government was personal and substantial. As detailed above, in the course of his duties as the Legal Adviser, he received periodic classified written briefings, given to the very top officials of the State Department, describing the progress of the United States government's investigation to identify the perpetrators of the bombing. He also received periodic oral briefings, also given to the top officials of the State Department by Intelligence and Research Division officials, about the progress of the investigation. Although the exact contents of these briefings remain classified, they contained information implicating two countries other than Libya. In addition, Respondent had access to confidential communications and cables concerning the government's investigation into the bombing and the diplomatic response concerning it. Moreover, as a result of the Pan Am 103 bombing, Respondent engaged in a diplomatic exchange with a country other than Libya to convince that country to stop terrorist activities. The precise information in that exchange remains classified.

Respondent was also briefed about or attended a meeting between the CEO of Pan Am and the Secretary of State in which Pan Am detailed its theory that the United States government had specific advance warning about the bombing but failed to prevent it. Additionally, Respondent was informed in the course of his duties as the Legal Adviser that the United States government had investigated Pan Am's theory and believed it to be baseless. In connection with the Civil Case brought by the families of the victims, Respondent approved a memorandum specifying the State Department's proposed response to the subpoena by Pan Am seeking documents related to its

theory that the United States shared culpability for failing to prevent the bombing. This memorandum attached letters stating the Justice Department's description of Pan Am's theory and that all government agencies discounted it. The memorandum also approved the decision to designate a particular State Department official as the knowledgeable witness in response to the subpoena. In addition, Respondent advised that this State Department witness should be informed about the contents of the meeting among Pan Am and the State Department officials because that would not harm the United States government's interests.

These actions by Respondent constituted involvement in the government's investigation and the establishment of culpability for the Pan Am 103 bombing that was personal and substantial. Respondent's participation was direct and substantive, not peripheral, clerical, or formal. As the chief legal officer of the State Department—in effect its general counsel—Respondent was kept abreast of the progress of the investigation and the diplomatic efforts in response to the bombing so that he could provide advice when issues relating to the bombing confronted the State Department. Not only did he learn sensitive, confidential information through periodic briefings, but he also performed legal duties connected to the government's investigation and the establishment of culpability for the bombing. As a result of the Pan Am 103 bombing, he went to a foreign country to convince it to halt its terrorist acts; he approved the response to Pan Am's subpoena; and he approved the decision to inform the State Department witness of the substance of the Secretary of State's meeting with Pan Am's CEO because, in Respondent's legal judgment, it would not do any harm to State Department or United States interests. In all of these decisions, he was acting to protect critical interests

of the State Department and the United States, including the important interests of avoiding any interference with the investigation into the bombing, defeating any claim that the United States shared culpability for the bombing, and convincing a suspected terrorist country to cease its acts of terrorism.

Third, the matter in which Respondent participated personally and substantially in the government was substantially related to his later representation of Libya. The first prong of the *Brown* substantial relationship test is whether "the factual contexts overlap in such a way that a reasonable person could infer that a former government attorney may have had access to information legally relevant to, or otherwise useful in the subsequent representation." 486 A.2d at 48-49. We believe that the factual context of his participation in the State Department matter, as described above, clearly overlapped with the factual context of his representation of Libya in seeking consensual resolutions arising out of the same event.[20]

Respondent also learned information in the government that would be useful in his representation of Libya. As the Legal Adviser, he learned from State Department briefings evidence implicating two countries other than Libya in the bombing. He then represented Libya in an

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[20] We believe that the *Brown* substantial relationship test requires that the factual contexts of the government and subsequent matter overlap and that a reasonable person could infer that a former government attorney may have had access to information that is legally relevant to or otherwise useful in the subsequent representation. Otherwise, the former government attorney would be barred from numerous cases—even ones that are not factually related to the government matter on which the government attorney worked—because he or she may have learned specific information in the government that could be useful in many unrelated matters. In this case, however, both facets of the *Brown* test are met.

attempt to negotiate the amount of payments necessary to resolve all claims against Libya, including the pending claims by the families of the victims. Respondent was contemplating a $1 billion, *ex gratia* payment by Libya to the families of the victims, without any admission of fault by Libya. But the specific amount of the settlement would undoubtedly have been a matter of significant contention. One factor in any negotiations, including this one, is the likelihood of recovery if settlement negotiations fail. Therefore, in negotiations with the families of the victims, it would have been useful for the lawyer representing Libya to be able to argue that the plaintiffs' likelihood of recovery in any other forum was not certain and that Libya was not necessarily the sole country implicated in the atack. Respondent could argue that although the evidence now pointed to Libya, other evidence that Respondent learned while the Legal Adviser implicated two other countries. Respondent could claim that although the United States now concluded that Libya was responsible for the bombing, the existence of this previous evidence could reduce, at least in some small way, the plaintiffs' certainty that a fact-finder would find Libya liable, or solely liable, for the bombing. As a result, a high-level government lawyer such as Respondent, who was privy to the evidence suggesting other countries were responsible, could have used that information to argue that the victims should accept a substantial settlement offer, such as $1 billion, rather than asking for more, because of evidence suggesting even a small uncertainty that Libya would be judged the only culprit or would be ordered to pay the full amount of the damages.

This is not "a fanciful, unrealistic or purely subjective suspicion of impropriety." *Brown*, 486 A.2d at 48. Although Respondent claims that there is no evidence that the families of the victims would have accepted such an

argument, it is reasonable to believe that the argument could have some force, at least with some of the plaintiffs. It cannot be dismissed out of hand, even though the evidence pointed overwhelmingly to Libya as being responsible for the bombing when Respondent undertook his representation of Libya in 1993. It is precisely because Respondent learned information pointing to other countries through his government service, rather than through reliance on publicly available information, that the plaintiffs or their lawyers could not discount as totally irrelevant or unfounded the argument that other countries or groups might be determined to share some of the liability for the bombing.

For example, one of Respondent's exhibits, an October 10, 1990, newspaper article that appeared in *The New York Times*, discussed the newly discovered evidence linking Libya to the Pan Am 103 bombing. RX 12. The article stated that the new evidence implicating Libya did not clear the Iranians or the Syrians of involvement in the bombing. According to the article, anonymous government sources believed that Iran had commissioned the Libyans to carry out the bombing in retaliation for the United States' downing of the Iranian civilian airplane in 1988. *Id.* A later State Department fact sheet described the new evidence against Libya, but did not definitively rule out the possibility that others were implicated. RX 61. Thus, the specific evidence available to Respondent at the State Department suggesting that Iran or Syria were responsible, or at least partially responsible, for the bombing could be useful in negotiating down the amount that Libya would provide to the victims as an *ex gratia* payment.[21]

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21 Our dissenting colleague argues that by the time Respondent undertook his representation of Libya, "no reasonable question remained" regarding the culpability of Libya, and that a dis-

There is an additional argument that Respondent could have made, based on information he learned during his duties as the Legal Adviser, that may have been relevant to or useful in his representation of Libya. Respondent recognized that Pan Am also would have sought compensation from Libya for the damages it suffered as a result of the bombing. II Tr. 64. Any alleged negligence by Pan Am would likely be an issue in negotiations between it and Libya. It is plausible that Pan Am would attempt to argue that the United States shared some responsibility for failing to prevent the bombing. On behalf of Libya, Respondent could argue that any attempt by Pan Am to absolve itself of responsibility by shifting blame to the United States would be totally unfounded and that Pan Am would not be entitled to compensation from Libya for its damages, especially not full compensation. In this line of argument, Respondent could use information he

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tinguished lawyer such as Respondent would not "invite ridicule" by using outdated information to argue that anyone else was responsible. First, while the United States government believed that Libya was responsible and had indicted two Libyans for committing the bombing, no tribunal had unequivocally established their guilt or, more to the point, had answered all question whether others were also involved. Even the United Nations' resolution that our colleague cites does not conclude that Libya was *solely* responsible for the bombing; it referred to investigations which "implicate officials of the Libyan Government" and called on the Libyan government to cooperate fully in *establishing* responsibility for the bombing. RX 18. We are not saying that the record demonstrates that other countries were also involved. But because of Respondent's former government activities and the information to which he had access as a government lawyer, he was in a position to argue that $1 billion was a good settlement for the plaintiffs in light of evidence pointing to the involvement of others, even if the evidence in 1993 indicated that the Libyans had carried out the attack. Precisely because of Respondent's former position and the information to which he had access in the government, the families of the victims could not dismiss that argument as ridiculous or obsolete.

learned while the Legal Adviser that Pan Am's theory of United States government liability had been thoroughly investigated and discredited. While Respondent points out that Pan Am's theory lacked evidentiary support and had not been accepted by any court, Respondent was in an even better position to dispute it by virtue of the information about the United States government's investigation and dismissal of Pan Am's theory that he learned while he was the Legal Adviser.[22]

Therefore, we find it reasonable to infer that Respondent had access to information that would be legally relevant or useful when seeking consensual resolutions on behalf of Libya. In reply, Respondent first argues that his participation in any particular matter relating to the Pan Am 103 bombing was not personal and substantial. He contends that, although he approved the response to

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22 The dissent claims that this argument is unpersuasive because Respondent had limited his representation of Libya and also because Pan Am could not "possibly have been persuaded to accept less than full compensation" because of its negligence. The dissent's argument is faulty for several reasons. Respondent's representation extended to representing Libya "in connection with ongoing civil and criminal disputes and litigation relating to the destruction of Pan Am 103 over Lockerbie . . . [and] providing legal advice and proposing legal steps to deal with this matter." BX 10. This representation would have included advising Libya with regard to Pan Am's potential claim, even though Respondent believed that Libya was responsible for the bombing and had limited his undertaking to seeking consensual resolutions only. Respondent testified that he believed that Pan Am would seek part of the proposed *ex gratia* payment, although he did not contemplate any payment by Libya for such a purpose. II Tr. 64. Thus, his representation would have involved responding to Pan Am's demands and negotiating whether Libya would pay anything to Pan Am. It is not implausible, contrary to the dissent's claim, that Pan Am's relative negligence would have been an issue in these negotiations, for the very reason that Pan Am might be reluctant to accept less than full compensation and Libya would be reluctant to pay it.

the Pan Am subpoena request, his approval was perfunctory and routine, rather than substantive. Yet, as we described above (*see* paragraphs 18-19), Respondent's approval of the memorandum constituted the exercise of discretion, and we do not think it was without substance. The approval may not have been the most memorable of decisions Respondent took as the Legal Adviser, but it was neither clerical nor ministerial. Respondent had instituted a policy to review and approve all legal advice from his office to certain, high-level State Department officials, and this memorandum fell within his policy. He reviewed the memorandum, approved its recommendation, and authorized it to be sent to a high-level official in the State Department. His approval was a critical step in the decision and cannot be dismissed as insignificant. *See* D.C. Legal Ethics Committee Opinion No. 177 (1986) (participation was substantial when hearing examiner reviewed another examiner's recommended decision and had authority to suggest possible alternatives).

Second, Respondent argues that even if his participation in the response to the subpoena was personal and substantial, it was not substantial participation in the underlying Civil Case. This argument has merit. Responding to a subpoena request alone is not the equivalent of personal and substantial participation in the issues of the underlying litigation, particularly if the responding lawyer learns nothing about issues in that litigation when dealing with the subpoena. In this case, when approving the memorandum, Respondent learned about the issues related to the subpoena response but not the issues of the litigation.

We believe that if all Respondent had done in response to the Pan Am 103 bombing was approve the memorandum concerning the suboena request, he may not have

violated Rule 1.11(a) by subsequently representing Libya. For example, we do not think that Mr. Hergen, an attorney in the Office of Legal Adviser who reviewed the proposed subpoena response, would have been precluded from representing Libya based solely on his participation in the subpoena response.

But Respondent had additional involvement in issues related to the Pan Am 103 bombing while he was the Legal Adviser. As described above, he was periodically apprised of the progress of the continuing investigation to identify the perpetrators; he learned of Pan Am's theory of United States government liability; he learned that the government investigated and discounted Pan Am's theory; he participated in a diplomatic exchange with a foreign country because of the Pan Am 103 bombing to convince that country to curtail its terrorist activities; and he provided legal advice that the State Department's designated witness should be informed about the theory that Pan Am had advanced in the meeting with the Secretary of State because informing the witness would not harm the government's interests.

Respondent contends that these additional actions do not prove any violation of Rule 1.11(a). He claims that even though he received confidential briefings about the progress of the government's investigation into the bombing, he did not learn this information in connection with any particular matter in which he participated personally and substantially as the Legal Adviser. We disagree. Respondent was briefed about the United States government's investigation into the bombing as part of his official duties as the Legal Adviser so that he would be in a position to provide legal advice to government officials concerning the government's response to the bombing. We do not believe that Rule 1.11(a) allows a government

lawyer to be briefed in the course of his official duties about a sensitive investigation so that he can provide legal advice, thereby learning important confidential information, then leave the government and represent a suspect in the same investigation. This is true even if the lawyer who is briefed about the investigation so that he can provide the legal advice is never called upon to give such advice. This is particularly true for a high-level government official such as the Legal Adviser, who may be briefed on various sensitive matters so that he will be in position to provide legal advice but may not give advice on all of them.

A hypothetical example, not dramatically different from this case, illustrates our point and makes clear the problems inherent in a contrary reading of Rule 1.11(a). An Assistant Attorney General (AAG) in charge of the Department of Justice's Office of Legal Counsel (the functional equivalent of the Legal Adviser in the State Department) may be briefed about the progress of an investigation into a terrorist bombing of a government office building. The AAG is briefed so that he or she will be in a position to provide advice on any complicated constitutional or other legal issues that may arise in the investigation. If the briefing focused on one individual or country as being responsible for the attack, the AAG should not be able, after leaving the government, to represent another individual or country later accused of the attack, even if the AAG agrees to seek only consensual settlements. This is true regardless of whether the AAG actually gave advice on legal issues related to the investigation while in the government. We believe that the AAG's participation in the briefings and receipt of confidential government information constitute personal and substantial involvement in the investigation, and preclude the AAG from

participating in related matters after leaving the government.

Even if this interpretation of Rule 1.11(a) is wrong, however, in this case Respondent did more than learn confidential information about the progress of the investigation into the Pan Am 103 bombing through periodic briefings. In fact, he was called on to provide legal advice related to the investigation and establishment of liability for the bombing, including whether the State Department witness should be informed about Pan Am's theory of government liability and how a third country should be persuaded to stop its terrorist activities.

Respondent argues that the information he learned from the government's investigation implicating Iran and Syria was made public before he began his representation of Libya, and therefore any lawyer who represented Libya would have access to the same or similar information. First, it is not clear that all the specific information he learned relating to the investigation was made public. Some information about why the United States suspected Iran and Syria was made public. But the specifics of the briefings still remain classified, and Respondent did not state with certainty that everything he learned was made public. II Tr. 45-48. He also acknowledged that some information he learned about the investigation into the Pan Am 103 bombing may remain confidential in both the security and ethical senses. II Tr. 47-48.

Even if all the information he learned while the Legal Adviser was publicly reported—which has not been shown—this does not relieve Respondent of his ethical duty to keep his client's confidences secret or to avoid a representation where those confidences could be useful. Because Respondent learned the information connecting

Iran and Syria to the bombing while the Legal Adviser, his arguments about that information would have more weight than if a private lawyer repeated what he or she read in publicly available sources. For example, a public report about what the government knew concerning Iran or Syria may not be accurate. Nor would it necessarily be complete. Respondent was in a position to argue much more authoritatively about information and conclusions concerning the government's investigation and the evidence related to other suspected culprits than a lawyer who simply repeated information that was publicly available.

Respondent's final argument is that because he limited his representation of Libya, nothing he learned as the Legal Adviser would have been useful in the representation. Respondent stated that, to avoid any suggestion or appearance that his knowledge that other countries had been suspected might be used in his representation of Libya, he never would have considered defending Libya or helping it avoid responsibility for the bombing. This argument is flawed for several reasons. Although Respondent agreed to pursue only consensual resolutions, he was Libya's lawyer. He was not a mediator, hired by both sides to facilitate a resolution.[23] His ethical obligation was to reach the best result for Libya that would be acceptable to other parties. The payment that Respondent contemplated—an *ex gratia* payment, or payment made without acknowledgment of responsibility—did not preclude him from negotiating down the amount of the settlement. He may not have agreed to defend Libya, but he did agree to represent its interests in reaching consensual settlements, and the information he learned could have

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23 As Respondent stated, he was not going to lobby on behalf of Libya, but he "was a lawyer doing things that a lawyer does." I Tr. 221.

been useful in that endeavor. Arguing that a $1 billion settlement should be accepted because of the potential that the plaintiffs would not receive the same amount from Libya in another forum is not defending Libya or contrary to the terms of his representation agreement; it is marshalling permissible arguments to advance the interests of his client.

Bar Counsel rightly points out that when Respondent was considering representing Libya, he told Mr. Gerson, who represented relatives of the victims in seeking damages from Libya, that he "may be on the other side." The settlement negotiations would have been adversarial, with Respondent representing Libya's interests, even if the means for resolving the dispute was limited to a settlement rather than litigation. Similarly, his attempt to negotiate with the United States the surrender of the two indicted Libyans and the venue for their trial would have been an adversarial undertaking. It would not have been qualitatively different from negotiations lawyers pursue for their clients, even ones who do not intend to litigate the matter if consensual resolution cannot be reached.

But Respondent argues he would not, in fact, have used any information he learned while in the government to the detriment of any party in seeking a consensual resolution. He stated that he was proceeding on the assumption that Libya was responsible for the bombing. II Tr. 114. We accept that testimony. Respondent may not have had any specific intent to use the argument that evidence previously pointed to a country other than Libya as responsible for the bombing. Respondent may have accepted as fact that Libya was responsible for the bombing and never used information suggesting that other countries shared responsibility. But Rule 1.11(a) is a broad prophylactic rule that does not depend on the sub-

jective intent of a lawyer, or even what a lawyer does with the information. A lawyer cannot agree to a representation and put himself in a position where the information learned in the government *could* be useful, even if the lawyer says that he or she will not use it. The rule prevents even the *possibility* that a lawyer could use confidential information learned while employed in the government. *See* D.C. Legal Ethics Committee Opinion 177.[24]

We believe that one of the most telling pieces of evidence at the hearing was Respondent's testimony concerning whether there would have been an ethical issue had he agreed to represent Libya for all purposes, including defending it in litigation. Respondent said he would not have considered such a representation, but acknowledged that it would have raised an ethical issue because:

> I felt that if I were representing Libya at least the appearance would arise that I had access to information about the two other potential culprits—if I were defending Libya, that I would have access to information about the two other culprits that might be helpful in that context.

II Tr. 113-14. We agree with this assessment. Preventing the appearance of impropriety is an important consideration underlying Rule 1.11(a). Comment 5 to Rule 1.11 explicitly states that Rule 1.11(a)'s "absolute disqualification of a lawyer from matters in which the lawyer participated personally and substantially carries forward a

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24 The dissent labels as "speculation" and "unsupported conjecture" what "Respondent might have argued had he continued to represent Libya." We do not speculate at all about what Respondent would have done, because he accepted a representation in which he could have used the information he learned in the government. The ethical rule prohibits a lawyer from accepting a representation in which he is in a *position* to use the government information, which Respondent did here, regardless of whether he ever uses it.

policy of avoiding both actual impropriety and the appearance of impropriety that is expressed in federal conflict-of-interest statutes and was expressed in the former Code of Professional Responsibility." *See also Committee for Washington's Riverfront Parks*, 451 A.2d at 1188 (revolving door disciplinary rule "is intended to prohibit conduct which would present even the appearance of impropriety"); *Kessenich v. Commodity Futures Trading Comm'n*, 684 F.2d 88, 97-98 (D.C. Cir. 1982) (factor to consider in application of rule is the danger of an appearance of impropriety).

In short, we agree with Respondent's apparent concession that he would have committed an ethical violation if he undertook to defend Libya for all purposes, because of the appearance that the information he learned while the Legal Adviser could have been helpful. But we do not agree that the limitation Respondent imposed on the representation—seeking consensual resolutions only—rendered the information he learned useless or made the appearance of impropriety dissolve.

In reaching our conclusion that Respondent violated Rule 1.11(a) by representing Libya, we are not implying that Respondent was not credible when he testified that he did not intend to and would not have used the information gained in his government duties. Nor should he be faulted in any respect, as some have done, for representing an unpopular client. We believe he sincerely wanted to use his legal skills to negotiate a "Kissingerian" global settlement acceptable to all parties. He had taken on a difficult but not impossible task (at a substantial fee), and a settlement may have been beneficial to all.

Yet, even if his motivation was laudable and the results would have been beneficial, the purpose of the rule is to ban all representations, even when the outcome of

the representation is not adverse to the government or any private party. There was an ethical bar to his representation of Libya, which Respondent ignored. He did not view Rule 1.11 as a real issue when he should have. He made no attempt to ask the State Department, before he began the representation, about his participation in matters involving the Pan Am 103 bombing. He inquired of the State Department only after the representation began and a public outcry about his role developed. II Tr. 82-83; 107-08. Nor did he address in a systematic way, with the ethics experts in his firm or any expert outside his firm, whether his government service was an ethical bar to his representation of Libya because of Rule 1.11. Of course, it is not an ethical violation for a lawyer to fail to inquire from the lawyer's former government agency about the matters in which the lawyer participated or to consult with experts about an important ethical question. But that would have been advisable in this case. Because Respondent did not appreciate the ethics issue, however, he did not examine it closely or systematically, resulting in the violation we find in this case.

Finally, we acknowledge that a broad interpretation of Rule 1.11(a) has consequences for the numerous government attorneys who enter private practice. We do not think they are unwarranted consequences or unduly onerous ones. Government lawyers can use the contacts, expertise, and skills they develop in the government on many matters in private practice. Their government service normally will be a benefit to their rainmaking efforts, rather than an impediment to their ability to work on many matters. Former government lawyers can work on any matter not substantially related to one in which they personally and substantially participated in the government. This leaves a wide area of permissible activity and

should not dissuade talented lawyers from entering government service.

In Respondent's case, for example, he could not represent a private party in connection with matters relating to the government's investigation or the establishment of liability for the Pan Am 103 bombing. Nor could he represent private clients in other matters in which he participated personally and substantially in the government. Because of Respondent's high position and his participation in many of the important matters confronting the State Department during his tenure, he might be barred from a significant number of representations. But there are numerous other matters in which he did not participate in the government or that arose after he left the government, and he could use his talents to solve them. He could seek to work on the next thorny international issue that arises. Many will fit in the permissible category. He just cannot work on those that are substantially related to ones in which he participated personally and substantially while in the government.

Thus, we do not believe that a broad interpretation of Rule 1.11(a) places unfair or burdensome constraints on government lawyers when they enter private practice. We also believe that a broad interpretation is critical to promoting public trust and confidence that government lawyers will not conduct their government activity with an eye toward private employment or use information gained in their government service for the benefit of private clients. *See Brown*, 486 A.2d at 44-48; *Committee for Washington's Riverfront Parks*, 451 A.2d at 1189 (public confidence is factor to balance in application of revolving door ethical rule).

IV. PROPOSED SANCTION

In determining the appropriate sanction, the Committee must look to the seriousness of the violation, any harm as a result of the violation Respondent's prior disciplinary violations, and mitigating or aggravating circumstances. *See, e.g., In re Peek,* 565 A.2d 627, 632 (D.C. 1989); *In re Reback,* 513 A.2d 226, 231 (D.C. 1986) (en banc); *In re Knox,* 441 A.2d 265 (D.C. 1982); *In re Haupt,* 422 A.2d 768, 771 (D.C. 1980).

We agree with Bar Counsel that an informal admonition is appropriate. First, while the offense was serious, we do not believe that Respondent intentionally violated the ethical rule. Rather, his misconduct was caused by omission. As noted above, he failed to address systematically the ethical rule at issue, either inside or outside his firm. It would have been prudent for him to have determined, through inquiry to the State Department or ethics experts, whether there were any facts or reason under the ethics rules why he could not represent Libya. While we accept Respondent's explanation that he did not want to make this inquiry and create a bombshell if Libya did not intend to follow through with the representation agreement, he made no effort, before the representation began, to undertake that inquiry.

Even now, Respondent appears to have an abiding belief that his conduct did not violate Rule 1.11(a). Interpreting this rule in a disciplinary proceeding is a case of first impression. Because of the absence of precedent involving Rule 1.11(a) in disciplinary proceedings, we think it unfair to impose a harsh penalty on Respondent.

Rather, this case should provide a guide for others to consider in similar circumstances. We are confident that Respondent needs no harsh sanction as a deterrent and will conduct his legal affairs with integrity, as he has in

the past. Not surprisingly, Respondent has no prior disciplinary violations. He has a distinguished record in public and private service that is rivalled by few, which must be taken into account when determining the appropriate sanction.

In addition, little or no harm was caused by Respondent's short representation. Whether harm would have occurred had Respondent's representation continued is unknown. But the representation, lasting less than three weeks, did not prejudice the government or disclose any confidences. Respondent did little more than prepare to undertake the representation before it ended.

We disagree with Bar Counsel that Respondent's firm contention at the hearing that he did not violate any ethical rule should be held against him. Respondent should not be criticized for steadfastly advancing his position, even though we did not accept his arguments in the end.

V. CONCLUSION

For the foregoing reasons, the Hearing Committee finds that Respondent violated Rule 1.11(a) and recommends that he receive an informal admonition for the violation.

Respectfully submitted,

Hearing Committee Number One

/s/ Glenn A. Fine
GLENN A. FINE, ESQ.
Chair

/s/ Elizabeth S. Gere
ELIZABETH S. GERE, ESQ.

Date: October 22, 1996

DISSENTING OPINION OF JEAN R. WARNKE

After thorough consideration, I am unable to agree with the conclusion of the other members of Hearing Committee Number One that Respondent violated Rule 1.11(a) and with the recommendation that he receive an informal admonition. I can see no violation and believe that the petition should be dismissed by the Board on Professional Responsibility.

I agree with the majority that no showing was made to support Bar Counsel's contention that the bombing of Tripoli in 1986 was substantially related to Respondent's brief representation of Libya in 1993. With regard to Respondent's involvement as a government official in the U.S. response to the bombing of Pan Am Flight #103 in December 1988, I do not believe that his subsequent conduct offends the "revolving door ethical rule" as interpreted in *Brown v. District of Columbia Board of Zoning Adjustment*, 486 A.2d 37 (D.C. 1984) (*en banc*). The majority opinion states: "The Court emphasized that the critical issue was whether the attorney had the opportunity while participating in a matter in the government to gather specific information that the attorney could not otherwise have gained and that could be used on behalf of a private client in a later proceeding." (Page 41).

In reaching their conclusion on this issue, the majority assert that Respondent learned while Legal Adviser that initial evidence suggested that other countries might have been responsible for the Lockerbie bombing. They contend that he "could have used that information to argue that the victims should accept a substantial settlement offer, such as $1 billion, rather than asking for more, because of evidence suggesting even a small uncertainty that Libya would be judged the only culprit or would be ordered to pay the full amount of the damages." (Page

56). I find this conclusion unpersuasive. In the circumstances of mid-1993, I believe, contrary to the majority's view, that this is indeed "a fanciful, unrealistic or purely subjective suspicion of impropriety." (Page 56, citing *Brown,* 486 A.2d at 48.) Whatever the initial and quite understandable uncertainty, by July 1, 1993, when Respondent undertook a limited representation of Libya, no reasonable question remained regarding the responsibility for this atrocity. The possibility that nationals of other countries might have had some involvement would not mitigate Libya's full legal and financial liability.

As the record shows, on November 21, 1991, the United States and the United Kingdom brought criminal proceedings against two Libyan nationals charging them with complicity in the Lockerbie bombing. The United Nations Security Council, on January 21, 1992, called on Libya to comply with the demands of the United States and the United Kingdom, and when Libya failed to do so imposed comprehensive sanctions on March 31, 1992. Any speculation as to what Respondent might have argued had he continued to represent Libya is of course just that—unsupported conjecture. But I cannot believe that a lawyer who had been a professor at a distinguished law school, a federal district judge and a high ranking government official would invite ridicule by making the argument hypothesized by the majority. His purported "inside information" would be recognized and characterized as outdated and obsolete.

The majorty opinion puts forth "an additional argument that Respondent could have made, based on information he learned during his duties as the Legal Adviser, that may have been relevant to or useful in his representation of Libya." (Page 58.) The contention is that Pan Am might have sought compensation from Libya for its

damages incurred as a result of the bombing, that Libya would have tried to lessen its liability by asserting that Pan Am had been negligent in not preventing the bombing, and that Pan Am would then have tried to discount its own alleged responsibility by claiming that the United States had also been negligent. The further speculation is that Respondent, in arguing against Pan Am's claim, could use information he learned while serving as Legal Adviser that the United States had investigated and discredited Pan Am's claim of U.S. negligence.

The majority opinion assumes that Respondent's undertaking to represent Libya was virtually unlimited. At page 18 it is asserted that Respondent and his law firm were prepared "to assist in resolving by consensual negotiations *all* pending and potential civil and criminal litigation and other proceedings relating to the Pan Am 103 bombing." (emphasis added) Again, on page 55, Respondent is said to have "represented Libya in an attempt to negotiate the amount of payments necessary to resolve *all* claims against Libya, including the pending claims by the families of the victims" (emphasis added). I have seen nothing to indicate that any such all-encompassing representation was undertaken and Respondent has repeatedly disclaimed any such undertaking. At page 27, the opinion notes:

> "Moreover, according to Respondent, he believed that the limitation he placed on the scope of the representation—seeking consensual resolutions only and not helping Libya avoid liability—made everything he learned at the State Department irrelevant since he was proceeding on the assumption that Libya was responsible for the bombing."

In any event, I cannot see how Pan Am could possibly have been persuaded to accept less than full compensation

from Libya by any Libyan argument that Pan Am was negligent in not preventing its own horrendous crime. I don't believe any assailant would be able to avoid full liability for his crime by contending that his victim had been unwary. Thus, the majority's theory that Pan Am might have attempted to shift some of the blame for negligence to the United States and that Respondent's inside information would have frustrated such an attempt seems to me implausible (Page 58). Pan Am's interest would be best served by pinning the sole responsibility where it belongs, on the perpetrator of the bombing, not by trying to shift any blame to the United States or anyone else.

I therefore disagree with the statement on Page 58 that: "Any alleged negligence by Pan Am would likely be an issue in negotiations between it and Libya."

Accordingly, I am unable to find any violation of Rule 1.11(a) by Respondent and believe the Board on Professional Responsibility should dismiss the Petition.

Respectfully submitted,

/s/ Jean R. Warnke
JEAN R. WARNKE

Date: October 22, 1996

APPENDIX D

[Filed Oct. 8, 1999]

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 97-BG-1096

In the Matter of
ABRAHAM D. SOFAER, ESQUIRE
A Member of the Bar of the
District of Columbia
Court of Appeals

BDN: 280-93

BEFORE: Wagner, Chief Judge; Terry, Steadman, Schwelb, * Farrell, * Ruiz, Reid, Glickman and Washington, Associate Judges; and * King, Senior Judge.

On consideration of respondent's petition for rehearing or rehearing en banc, the response thereto, the motion of amicus curiae for leave to file brief, and Bar Counsel's response thereto, it is

ORDERED that the motion of amicus curiae for leave to file brief is granted and the Clerk is directed to file the amicus curiate brief. It is

FURTHER ORDERED by the merits division * that the petition for rehearing is denied; and it appearing that the majority of the judges of this court has voted to deny the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM.

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* Wagner, Chief Judge; Ruiz, Reid and Glickman, Associate Judges; would grant rehearing en banc.

Supreme Court, U.S.
FILED
MAR 3 2000
CLERK

(2)

No. 99-1143

IN THE

Supreme Court of the United States

ABRAHAM D. SOFAER,

Petitioner,

v.

DISTRICT OF COLUMBIA COURT OF APPEALS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

RESPONDENTS' BRIEF IN OPPOSITION

ROBERT R. RIGSBY*
Corporation Counsel of the District of Columbia
CHARLES L. REISCHEL
Deputy Corporation Counsel
Appellate Division
Office of Corporation Counsel
District of Columbia
441-4th St., N.W., Sixth Floor
Washington, D.C. 20001
(202) 727-6252

Attorneys for Respondent District of Columbia Court of Appeals

JOYCE E. PETERS
District of Columbia Bar Counsel
MICHAEL S. FRISCH
Senior Assistant Bar Counsel
Office of Bar Counsel
515-5th St., N.W., Room 127
Washington, D.C. 20001
(202) 638-1501

Attorneys for Respondents District of Columbia Board on Professional Responsibility and Office of Bar Counsel

* *Counsel of Record*

158285

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

23pp

QUESTION PRESENTED

Whether the District of Columbia Court of Appeals properly imposed an informal admonition on Petitioner for violation of a local bar rule, based on his representation of a private client with respect to an airline bombing when he had been personally and substantially involved with the investigation and litigation concerning the same airline bombing when he was Legal Advisor to the Department of State?

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OPINION BELOW

The opinion of the District of Columbia Court of Appeals (Pet. App. 1) appears at 728 A.2d 625 (D.C. 1999).

STATEMENT OF JURISDICTION

The judgment of the District of Columbia Court of Appeals (the "Court"), for which review is sought, was entered April 22, 1999. Petitioner filed a petition for rehearing or rehearing en banc, which the Court denied by order entered October 8, 1999. Petitioner filed his petition for writ of certiorari on January 6, 2000.

STATUTE AND RULES

The pertinent statute conferring jurisdiction on the District of Columbia Court of Appeals to discipline members of its Bar, the relevant Rule of Professional Conduct and the procedures prescribed by the Board on Professional Responsibility are set out in Appendix A to this brief.

STATEMENT OF THE CASE

This matter arises out of the application of a local ethical rule governing the conduct of members of the District of Columbia Bar, the organization to which all lawyers practicing in the District of Columbia are required to belong. It has its genesis in the bombing of Pan Am Flight 103 on December 21, 1988. The airplane was blown apart over Lockerbie, Scotland by plastic explosive hidden in a radio cassette player placed inside a suitcase on the flight. All 289 persons on board and 11 persons on the ground were killed. (Pet. App. 14a).

As the State Department's Legal Advisor from June 1985 to June 15, 1990, Petitioner received daily written briefing reports and occasional oral briefings that contained information about the progress of the United States Government's investigation of the bombing, a process that was ongoing throughout the remainder of his service in government. Petitioner also had access to classified communications and cables relating to the progress of the investigation and related diplomatic efforts involving the bombing. (Pet. App. 15a).

In 1989, families of the victims of the bombing filed wrongful death lawsuits against Pan Am and other defendants in several federal courts. In April 1989, the litigation was consolidated before the United States District Court for the Eastern District of New York. (Pet. App. 16a).

Pan Am served non-party subpoenas on the State Department and other government agencies seeking documents and the identification of witnesses related to a theory that the United States Government had had advance warning of the bombing but had failed to take appropriate steps to prevent it. (Pet. App. 16a). The Justice Department coordinated agency efforts to respond to the subpoenas and ultimately to quash them in light of its ongoing criminal investigation into the bombing. *Id.* An attorney in Petitioner's office drafted a memorandum recommending the State Department's response to the subpoena. *Id.* 17a. The memorandum was transmitted from Petitioner, in his capacity as Legal Advisor, and from the head of the State Department's Office on Counterterrorism to the State Department's Director General, who was responsible for responses to such subpoenas on behalf of the State Department. *Id.* The memorandum reflected that a search of

pertinent files had revealed the existence of approximately 400 documents responsive to Pan Am's request, described the classified nature of approximately half of the documents, and therefore contended that such documents could not be released under the "state secrets" privilege. *Id.* The memorandum further directed that an official of the State Department be designated as the appropriate witness to testify with respect to events described in the responsive documents. *Id.* Petitioner read the memorandum and its attachments and indicated his approval by initialing it. He also either attended meetings or was informed of the discussions at internal government meetings connected with the response to the subpoena and its underlying allegations. *Id.* 18a-20a.

On June 15, 1990, Petitioner left the State Department to become a partner in the Washington, D.C., office of a New York law firm (Pet. App. 22a). In late 1992, he was approached by another lawyer outside his firm to ascertain whether he would have an interest in representing Libya in connection with legal proceedings in the United States arising from the Pan Am Flight 103 bombing. *Id.* 23a. Thereafter, he undertook the representation of the Libyan government in connection with the ongoing civil and criminal disputes and litigation relating to the Pan Am bombing. On April 14, 1993, Petitioner and Libyan representatives executed a $3 million retainer agreement that called for monthly disbursements from the retainer at the rate of $250,000 per month. (Pet. App. 23a). Petitioner did not consult with the State Department prior to undertaking the representation. (Pet. App. 31a). He did not initiate an inquiry with the State Department to determine whether he had worked on any matters that arguably could be considered substantially related to his proposed representation of Libya.

Id. 24a-25a. Nor did he seek the views of the Department of Justice or the Ethics Committee of the District of Columbia Bar, both of which routinely provide attorneys with assistance in interpreting ethical rules related to conflicts of interest.

In preparation for the representation, he and his law firm took several steps, including an attempt to obtain the required license from the Office of Foreign Assets Control ("OFAC") of the Department of the Treasury for receipt of payments from Libya for legal services. *Id.* 27a. On May 10, 1993, OFAC issued a specific license to the law firm to receive payments of fees and expenses in connection with the pending criminal and civil cases, as well as any other United States court cases relevant to the Pan Am 103 litigation. *Id.* 28a. An attorney in Petitioner's law firm, who represented two plaintiffs seeking compensation from Libya for the bombing, was advised that he would have to leave the firm, if the firm were retained by Libya. *Id.* 28a-29a. After the retainer agreement was signed, the attorney withdrew from his position with the firm. *Id.* 29a.

On July 1, 1993, the firm received the first $250,000 retainer payment from Libya. (Pet. App. 32a). Petitioner and his law firm considered their representation of Libya to have begun on that date. Thereafter, Petitioner and his firm took several initial steps as part of the representation of Libya: surveying relevant treaties between the United States and Libya, researching procedures for filing an OFAC license with a court, and compiling documents in the Pan Am 103 civil case, the lawsuit in which Petitioner had been involved as Legal Advisor. Petitioner also sought relevant documents from Libya. *Id.* 33a.

On July 12, 1993, the firm issued a press release announcing that it had been retained by Libya to assist it in seeking a consensual resolution of litigation arising from the bombing. After negative public reaction, Petitioner and the law firm withdrew from the representation on July 16, 1993. (Pet. App. 33a-34a).

Subsequent to Petitioner's withdrawal, Bar Counsel of the District of Columbia initiated a disciplinary proceeding alleging that Petitioner had violated District of Columbia Rule of Professional Conduct 1.11(a). Bar Counsel investigated Petitioner's conduct and then informally admonished Petitioner for a violation of Rule 1.11(a). Petitioner rejected the informal admonition, so a Hearing Committee of the District of Columbia Board on Professional Responsibility (the "Board") held an evidentiary hearing concerning the alleged violation. The Hearing Committee found that Petitioner had violated Rule 1.11(a) and recommended an informal admonition. Pet. App. 135(a). Petitioner noted an exception to the Hearing Committee report, so the Board reviewed the report and heard oral argument on behalf of Petitioner and Bar Counsel. The Board affirmed the Hearing Committee's findings of a violation and also recommended the same sanction. *Id.* at 63.

Petitioner noted an appeal to the District of Columbia Court of Appeals (the "Court"). The Court affirmed the Board's conclusion that Petitioner had violated Rule 1.11(a) and affirmed the Board's order directing Bar Counsel to issue Petitioner an informal admonition. Pet. App. 9a.

REASONS FOR DENYING THE WRIT

This is a matter of purely local concern to lawyers practicing in the District of Columbia and admitted to the District of Columbia Bar. It involves no issues of national or general importance and no conflict with any decision in any other jurisdiction. It is also fact-intensive and fact-specific, rather than presenting a clear legal issue.

Petitioner seeks review of an order of the Court below directing that he be informally admonished for violation of Rule 1.11(a) of the District of Columbia Rules of Professional Conduct. The Rule states in relevant part:

> A lawyer shall not accept other employment in connection with a matter which is the same as, or substantially related to, a matter in which the lawyer participated personally and substantially as a public officer or employee.

The Court below concluded that Petitioner had violated the Rule when he undertook to represent the government of Libya in connection with criminal and civil disputes in litigation arising from the bombing of Pan American Flight 103, after having served as Legal Advisor in the United States Department of State and having taken part, personally and substantially, in the Government's investigation of the bombing and in related diplomatic and legal activities.

The Court below reached its conclusion on review of findings rendered by a Hearing Committee, empaneled by the Board that had conducted an extensive evidentiary hearing, had determined that the violation of Rule 1.11(a)

was established by clear and convincing evidence, and had recommended an informal admonition — the mildest form of public disciplinary sanction. (Pet. App. 130a-134a). The Board sustained the finding of a violation of Rule 1.11(a) by a vote of 6-1 and imposed the informal admonition. *Id.* 38a-62a, 64a. The Court adopted the Board's finding of a violation and sanction. *Id.* at 5a-9a.

Before the Court below, Petitioner contended that his various activities in the Department of State did not constitute a "matter," so as to prohibit his undertaking a representation in private practice on behalf of the government of Libya. (Pet. App. 2a). He further contended that his government activities had not been sufficiently "personal and substantial" to warrant the finding of an ethical violation. *Id.* 3a. The Court properly rejected these contentions, concluding that the ethical prohibition applied.

1. This Court previously has had occasion to note that each State:

> has an extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses. . . . The judiciary as well as the public is dependent upon professionally ethical conduct of attorneys and thus has a significant interest in assuring and maintaining high standards of conduct of attorneys engaged in practice.

Middlesex Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 434 (1982). Accord: *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995); *Ohralik v. Ohio Bar Ass'n*, 436 U.S. 447, 460 (1978); *Goldfarb v. Virginia Bar*, 421 U.S. 773, 792 (1975).

Responsibility for the discipline of attorneys admitted to the bar of the District of Columbia is vested in the Court below, which has the status of a supreme court of a state. *See* D.C. Code §§ 11-2501, 2502 (1995); D.C. Bar App. XI, § 1 (1996). Disciplinary sanctions are designed to maintain the integrity of the profession, protect the public and the courts, and deter other attorneys from engaging in similar conduct. *In re Reback,* 513 A.2d 226, 231 (D.C. 1986) (en banc). "[The court's] purpose in conducting disciplinary proceedings and imposing sanctions is not to punish the attorney; rather, it is to offer the desired protection by assuring the continued or restored fitness of an attorney to practice law." *In re Steele*, 630 A.2d 196, 200 (D.C.1993).

2. Before this Court, Petitioner fashions an argument different from that which he made below. He now contends that he was sanctioned on the basis of conduct that, at most, created an "appearance of impropriety." Pet. at 11-12. The record amply contradicts this suggestion. Petitioner's principal contention below was that the application of Rule 1.11(a) permitted an impermissible shifting of the burden of proof. The Court below properly rejected this argument, noting that the Board had recognized that the case involved attorney discipline. Thus, the Court below and the Board viewed Petitioner's conduct, including the overlap of the two matters, from the perspective of Bar Counsel's obligation to prove an ethical violation by clear and convincing evidence. (Pet. App. at 5a.). The Board and the Court below agreed that Bar Counsel had met that burden.

The decision of the Court below makes clear that Petitioner was found to have engaged in an ethical violation based on his course of conduct in undertaking representation of Libya in a matter (the bombing) in which he was personally

and substantially involved as the Legal Advisor to the Department of State. He was not sanctioned based on an appearance of impropriety. Petitioner received regular classified briefings concerning the Government's investigation into the bombing. He participated personally and substantially in the Government's response to third-party subpoenas in the civil case arising from the bombing. He then left Government service and accepted representation of Libya that encompassed criminal and civil litigation relating to the very same bombing.

Petitioner's activities in government service as Legal Advisor to the Department of State involved the same bombing about which he undertook representation in private practice. Further, there is no basis to dispute that Petitioner was personally and substantially involved in both the bombing investigation and the resulting civil litigation as a government attorney. While Petitioner suggests that the application of the so-called "revolving-door" rule invites abuse, it is noteworthy that the District of Columbia's Rule 1.11 has been in existence, in its present and prior form, since the creation of the District of Columbia Bar in 1972. Government attorneys have entered private practice by the thousands since the adoption of the Rule without any suggestion that the rule is unworkable, unclear, or unfair. The Rule serves important public interests in protecting the Government's confidences and preventing use of confidences obtained during government service for private gain. *Brown v. District of Columbia Board of Zoning Adjustment*, 486 A.2d 37, 47-48 (D.C. 1984) (en banc). The fact that Petitioner can point to no other instance of the application of the Rule suggests that former government attorneys have no difficulty in understanding and complying with the Rule and that Bar Counsel has applied the Rule with restraint. The Rule was

applied here because Respondent undertook to represent Libya in the very same matter for which he was responsible as a government attorney.

It is clear that Petitioner understood the significance of the civil case in connection with the undertaking on behalf of Libya. He promptly caused the firm to obtain the files of the civil case for review. The firm determined to terminate its association with an attorney who represented a plaintiff seeking compensation from Libya for the bombing. Petitioner undertook the presentation without seeking ethics advice from either the Government or the District of Columbia Bar, both of which routinely provide this sort of advice.

Petitioner emphasizes that the Court below made no finding that he in fact actually received information in government service useful in the representation of Libya. Pet. at 14. It would impair attorney-client relations to require a detailed explanation of what occurred in the first representation as a predicate to finding an ethical violation in switching sides. Further, such a standard would be unworkable, because only interested parties would know about the substance of the protected information. This is particularly problematic in a situation involving a Government attorney operating at the top levels of the national security system. Here, the information received by Petitioner as a Government attorney was highly sensitive and shielded by the "state secrets" privilege, so it would be particularly inappropriate to require the identification of specific information received by Petitioner useful to his representation of Libya. In any event, because the Government and the private representation in this case involved the very same matter, *i.e.*, the bombing — an objective test — the Court below properly concluded that identification of particular information was not required to sustain the finding of an ethical violation.

3. Petitioner also contends that he was denied due process in that he somehow was subjected to continual changes in the disciplinary violation with which he was initially charged by Bar Counsel, on which he was tried before the Hearing Committee, and for which he was held accountable by the Board and the Court below. He contends that he was deprived of meaningful notice and opportunity to defend. This contention is purely rhetorical. At all times, Petitioner faced a charged violation of Rule 1.11(a) — nothing more or less. Initially, Bar Counsel issued to Petitioner an informal admonition for the violation, pursuant to the authority vested in Bar Counsel by D.C. App. R. XI, § 6(a)(3). Bar Counsel found a violation of Rule 1.11(a) for Petitioner's successive Government and then private representation involving the same bombing, based upon the evidence that Petitioner's representation of the Libyan Government was substantially related to matters that had come before him while he held the position of Legal Advisor at the State Department. Petitioner exercised his right to reject the informal admonition. Thereafter, Bar Counsel filed a petition charging that Petitioner had violated the same Rule identified in the informal admonition, Rule 1.11(a). A plenary hearing was held before a Hearing Committee to determine whether he had violated the Rule. The Hearing Committee carefully reviewed the evidence and issued a thoughtful, comprehensive analysis, setting forth the basis of its determination. The Board and the Court below affirmed the finding.

It is immaterial that the formal charge did not track, *in haec verba*, the language of the informal admonition. The charged violation was identical. (Pet. App. 102a-103a). In presenting the case for prosecution, Bar Counsel was properly permitted to develop and present evidence, beyond that available when the informal admonition was issued, in

order to bolster proof of the charged violation. It is likewise immaterial that the Hearing Committee sustained the charged violation on a basis not identical to that proposed by Bar Counsel. No rule of law required the Hearing Committee to share its proposed findings of fact and conclusions of law with Petitioner in advance of its report and recommendation to the Board. If Petitioner had additional arguments or evidence to present to the Hearing Committee in light of its Report, he should have asked for a rehearing before that tribunal. He did not do so.

By like token, if Petitioner believed that the Board had so substantially reformulated the operative definition of "matter" as to require him to defend a charge that he had had no meaningful opportunity to address, he should have asked the Board to reconsider its decision. He did not do so. His argument now is an afterthought and a makeweight.

The matter is not *In re Ruffalo*, 390 U.S. 544 (1968), on which Petitioner places principal reliance. There this Court concluded that an attorney subject to disciplinary authority is entitled to fair notice of the charge. The attorney had been subject to a proceeding in Ohio in which he was charged with 12 counts of misconduct. Two of the charges involved allegations that he had solicited clients through an agent. *Id.* at 546. He was not on notice that his employment of the agent would be considered an offense until after both the agent and he had testified at length on all material facts pertaining to that phase of the case. He was then subjected to a new charge, based on his hiring of the agent to investigate the agent's own employer. *Id.* Because disciplinary proceedings are quasi-criminal in nature, this Court concluded that the attorney had been denied a fair hearing:

> The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of the testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.

Id. at 551.

Nothing of the sort happened in the present case. Here, the charges against Petitioner were identical throughout the proceeding below. Petitioner was always on notice of the charge. The Hearing Committee, the Board and the Court below properly concluded that Petitioner was aware of the allegation from the outset and was provided a full and fair opportunity to contest it. Unlike the attorney in *Ruffalo*, he was not trapped by his own testimony. Petitioner was fairly on notice that his conduct in government and subsequent private practice formed the basis of the allegation that he had violated Rule 1.11(a) — an allegation sustained by clear and convincing evidence. He points to no discernible prejudice in that the finder of fact formulated the definition of "matter" with a slightly different focus than Bar Counsel. His suggestion that the Court below, in imposing the lightest form of public discipline available for the violation, treated him unfairly, must be rejected as unsupported by the record.

Petitioner's attack on the District of Columbia disciplinary process in his case, couched in terms of due process, is in reality nothing more than a dissatisfied litigant's expression of disagreement over the Court's interpretation of its Rule 1.11(a). The Court's fact-specific interpretation of its own Rule in a fact-intensive setting arising out of a unique set of circumstances does not create an issue meriting review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT R. RIGSBY*
Corporation Counsel of the District of Columbia
CHARLES L. REISCHEL
Deputy Corporation Counsel Appellate Division
Office of Corporation Counsel District of Columbia
441-4th St., N.W., Sixth Floor
Washington, D.C. 20001
(202) 727-6252

Attorneys for Respondent District of Columbia Court of Appeals

JOYCE E. PETERS
District of Columbia Bar Counsel
MICHAEL S. FRISCH
Senior Assistant Bar Counsel
Office of Bar Counsel
515-5th St., N.W., Room 127
Washington, D.C. 20001
(202) 638-1501

Attorneys for Respondents District of Columbia Board on Professional Responsibility and Office of Bar Counsel

* *Counsel of Record*

APPENDIX

APPENDIX — STATUTES AND RULES

District of Columbia Code, Sec. 11-2501:

> "The District of Columbia Court of Appeals shall make such rules as it deems proper respecting the examination, qualification, and admission of persons to membership in its bar, and their censure, suspension, and expulsion." (July 29, 1970, 84 Stat. 521, Pub. L. 91-358, title I, Sec. 111; 1973 Ed., Sec. 11-2501).

District of Columbia Code, Sec. 11-2502:

> "The District of Columbia Court of Appeals may censure, suspend from practice, or expel a member of its bar for crime, misdemeanor, fraud deceit, malpractice, professional misconduct, or conduct prejudicial to the administration of justice. A fraudulent act or misrepresentation by an applicant in connection with this application or admission is sufficient cause for the revocation by the court of such person's admission." (July 29, 1970, 84 Stat. 521, Pub. L. 91-358, title I, Sec. 111; 1973 Ed., Sec. 11-2502; June 13, 1994, Pub. L. 103-266, Sec. 1(b)(112), 108 Stat. 713.)

District of Columbia Court of Appeals Rule XI Governing the Bar:

> Sec. 1. "*Jurisdiction.* (a) Persons subject to disciplinary jurisdiction. All members of the District of Columbia Bar, all persons appearing or participating *pro hac vice* in any proceeding in accordance with Rule 49(c)(1) of the General Rules of this Court, all persons licensed by this Court as Special Legal Consultants under Rule 46(c),

and all persons who have been suspended or disbarred by this Court are subject to the disciplinary jurisdiction of this Court and its Board on Professional Responsibility (hereinafter referred to as "the Board")."

Sec. 2. "*Misconduct*. . . . (b) Acts or omissions by an attorney, individually or in concert with any other person or persons, which violate the attorney's oath of office or the rules or code of professional conduct currently in effect in the District of Columbia shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship. . . ."

Sec. 3. "*Disciplinary Sanctions*. (a) Types of discipline. Any of the following sanctions may be imposed on an attorney for a disciplinary violation . . . (5) Informal admonition by Bar Counsel . . ."

Sec. 6 "Bar Counsel shall have the power and duty . . . Upon prior approval of a Contact Member, to dispose of all matters involving alleged misconduct by an attorney subject to the disciplinary jurisdiction of the Court, by dismissal or informal admonition or by referral of charges."

District of Columbia Rules of Professional Conduct:

Rule 1.11 "(a) A lawyer shall not accept other employment in connection with a mater which is the same as, or substantially related to, a matter in which the lawyer participated personally and substantially as

a public officer or employee. Such participation includes acting on the merits of a matter in a judicial or other adjudicative capacity."

Rules of the Board on Professional Responsibility:

Rule 6.3 "*Action Following Rejection of an Informal Admonition*. In the event that respondent rejects an informal admonition, respondent shall request in writing a formal hearing. This hearing shall be conducted in accordance with Section 8(c) of Rule XI of the Rules Governing the Bar except that Bar Counsel and the Hearing Committee may not add any charge to the petition arising out of the same circumstances that Bar Counsel was aware of at the time of the investigation, which charge was not included in the original informal admonition."

Supreme Court, U.S.
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No. 99-1143

IN THE
Supreme Court of the United States

ABRAHAM D. SOFAER,
Petitioner,
v.

DISTRICT OF COLUMBIA COURT OF APPEALS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

REPLY BRIEF FOR PETITIONER

H. BARTOW FARR, III
Counsel of Record
RICHARD G. TARANTO
FARR & TARANTO
1850 M Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 775-0184

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REPLY BRIEF FOR PETITIONER

The Brief in Opposition fails to come to grips with either of the due process issues presented in our Petition. Those issues merit review by this Court.

1. The "revolving-door" rule of the District of Columbia Rules of Professional Conduct (Rule 1.11(a)), as construed, sets a broad, prophylactic standard that permits imposition of sanctions for conduct raising no more than an appearance of impropriety: *i.e.*, punishment may be imposed where there is a possibility that, during his government service, a lawyer "may have received" confidential information relevant to a later private representation. The Petition seeks review of the question whether this sort of appearance-based standard is too vague and elastic —too unpredictable for a lawyer to apply with assurance and too subject to arbitrary enforcement—to meet the minimum due process requirements for criminal and quasi-

criminal laws. Pet. 15-25. Rather than confront this issue, respondents elect to sidestep it, arguing that the case is "fact-intensive and fact-specific," Br. in Opp. 6, 13, and dismissing it as "a matter of purely local concern to lawyers practicing in the District of Columbia and admitted to the District of Columbia Bar." Br in Opp. 6. These assertions are neither accurate nor adequate.

To begin with, the question whether the "revolving-door" rule comports with due process principles is anything but "fact-intensive and fact-specific." The central issue is purely a legal one: may an attorney be sanctioned on the ground that he failed to recognize that he might have received information that, in fact, he did not receive? *See* Pet. App. 5a (violation of Rule 1.11(a) established by inference that an attorney "may have received information during [his government service] that might be useful [in a subsequent private representation]") (internal quotes omitted). If we are correct that this hypothetical standard not only gives insufficient notice of prohibited conduct but also grants unduly wide discretion to enforcement officials, then the sanction here cannot stand. That is a matter of law, not of fact.

Respondents are also off the mark in saying that petitioner "was not sanctioned based on an appearance of impropriety." Br. in Opp. 9. The District of Columbia Court of Appeals has explicitly said that the "revolving-door" rule is "intended to prohibit conduct which would present even the appearance of impropriety." *Committee for Washington's Riverfront Parks v. Thompson*, 451 A.2d 1177, 1188 (D.C. App. 1982). Furthermore, the "may have received" standard, on its face, makes a violation turn on whether hypothetical persons could possibly believe that relevant confidential information was received during government service, even if no such information actually was received (and therefore could not have been

used in a later representation). The emphasis on what observers might tend to believe, rather than on what actually happened, makes clear that Rule 1.11(a) is, as it was meant to be, an appearance-based rule, and it is on that basis, and that basis alone, that petitioner was sanctioned. *See* Pet. App. 5a ("the 'actual receipt of . . . information' . . . is immaterial") (quoting *Brown v. District of Columbia Bd. of Zoning Adjustment*, 486 A.2d 37, 50 (D.C. App. 1984) (*en banc*)).

This focus on appearance presents a compelling issue of unconstitutional vagueness. By virtue of that standard, a lawyer seeking to comply with an appearance-based "revolving-door" rule is unable to determine its applicability by relying upon his own knowledge of the information that he received during his government service. Rather, the lawyer is put to the murky task of imagining what a hypothetical person—having only a rudimentary awareness of the lawyer's government work—might think that he received. If the lawyer believes that he passes even this opaque test, enforcement officials are then free to engage in their own conjectural exercise, deciding (as here) that *their* hypothetical person would take a different view, inferring that the lawyer could have received relevant information that, in truth, he did not receive. While this process of guesswork may be acceptable in matters of disqualification, *see* Pet. 23-24, it is too malleable and imprecise to support the imposition of disciplinary sanctions. *See Gentile v. State Bar of Nevada*, 501 US. 1030 (1991); *see also Kolender v. Lawson*, 461 U.S. 352 (1983); *United States v. Lanier*, 520 U.S. 259, 265 (1997).[1]

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[1] Although respondents say that this due process "argument" is "different" from the due process argument made below, Br. in Opp. 8, they do not question that the issue is properly presented. As noted in the Petition, petitioner has pressed his due process objections, both to the standards of Rule 1.11(a) and to the procedure followed, at each stage of the proceedings below. *See* Pet. 10-11. That being so, " 'parties are not confined here to the same argu-

Respondents do not actually dispute that the rule is vague, raising instead a defense of necessity: *i.e.*, that an inquiry into actual receipt of information "would impair attorney-client relations." Br. in Opp. 10. But, while the confidentiality of "attorney-client relations" is obviously an important concern, it is an odd theory that would allow a government, in order to avoid discomfiting problems of proof, simply to punish persons for what they might have done, without having to show that they actually did it. It is hardly surprising, therefore, that, in similar contexts, the organized Bar and the courts have concluded that concerns about confidentiality do not trump the right of a lawyer to defend himself against ethical charges. To the contrary, the model disciplinary rules expressly recognize that, notwithstanding important interests in preserving confidentiality, a lawyer is entitled to breach the attorney-client privilege in order to rebut charges of misconduct. *See* American Bar Association, Model Rule of Professional Conduct 1.6; E. Cleary, *et al.*, *McCormick on Evidence* § 92, at 221 (3d ed. 1984). *See also Partington v. Gedan*, 961 F.2d 852, 863 (9th Cir. 1992). The Bar should not be able to undermine the right to a full defense simply by watering down the standard to permit findings of misconduct to be based on "what might have been." [2]

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ments which were advanced in the courts below upon a federal question there discussed.'" *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 78-79 n.2 (1988) (quoting *Dewey v. Des Moines*, 173 U.S. 193, 198 (1899)). *See also* Pet. 17 n.12.

[2] The conflict between confidentiality and a fair defense is largely illusory in this case, of course, given that the State Department has never claimed that petitioner received any confidential information that he might have been able to use in his limited representation of Libya. The charges were brought and prosecuted by Bar Counsel on the basis of newspaper stories, not because of a complaint by the State Department or anyone else.

Although respondents fault petitioner for not seeking "ethics advice" from the Bar, Br. in Opp. 10, this complaint (apart from disregarding the many cautionary steps taken by petitioner and his law firm) actually serves to highlight the problems associated with a vague law. To satisfy due process, a law used for punishment, not mere regulation, should be written with sufficient clarity to tell citizens "what conduct is prohibited," *Kolender*, 461 U.S. at 357, *without* the need to consult with enforcement officials in advance. Moreover, in the immediate context here, it is a troubling notion that, for lawyers to undertake certain private representations, it is necessary for them first to seek and obtain permission from the Bar. That prospect would be bad enough under a law with clear, precise terms, but the loose nature of the hypothetical-person standard raises the unsettling possibility that permission will be granted more easily to favored lawyers (or those with uncontroversial clients) and more readily withheld from disfavored lawyers (or those with unpopular clients). That risk would be just as prominent in a system calling for preclearance as it is in the present system, imposing disciplinary sanctions after the fact. *See* Pet. 20-22.

All this is not—as respondents would have it—"a matter of purely local concern." Br. in Opp. 6. While the District of Columbia ethical rules naturally apply only to members of the District of Columbia Bar, the scope of the law does not distinguish this case from other cases reviewed and decided by this Court. The ordinance struck down in *City of Chicago v. Morales*, 119 S. Ct. 1849 (1999), applied only to people in Chicago, and the ordinance invalidated in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), applied only to people in Jacksonville, yet the Court recognized that the constitutional issues raised by those laws were of wide-ranging significance. Indeed, the law at issue in this case is far less "local" than those city ordinances, given the fact that

the District of Columbia "revolving-door" rule is part of the Model Rules of Professional Conduct, which have been adopted, to a greater or lesser degree, in more than 40 States. And, even if that were not so, there is particular reason to assure that the rule, as construed and applied in the District of Columbia, comports with constitutional standards, in light of the large numbers of District of Columbia Bar members that serve in the federal and local governments. The question thus is serious and important, and it warrants the attention of this Court.

2. With respect to the second question presented, respondents do not deny that a post-hearing change in the charges against petitioner took place. Although they twice claim that the charges against petitioner were "identical," Br. in Opp. 11, 13, they ultimately concede that the Hearing Committee acted "on a basis *not identical* to that proposed by Bar Counsel." Br. in Opp. 12 (emphasis added). The question thus becomes: is that alteration of charges—replacing three alleged particular "matters" with one broader, all-encompassing "matter"—consistent with due process? Respondents seem to offer two possibilities for why it might be. The first is that petitioner was always accused of violating the same rule. *See* Br. in Opp. 11 ("[a]t all times, Petitioner faced a charged violation of Rule 1.11(a)—nothing more or less"). The second is that, even if the details changed, the broad parameters of the charges stayed the same. *See* Br. in Opp. 13 ("[p]etitioner was fairly on notice that his conduct in government and subsequent private practice formed the basis of the allegation that he had violated Rule 1.11(a)"). Neither of these arguments remotely resolves the due process problem.

Although respondents are correct that petitioner was always charged with a violation of Rule 1.11(a), they cite no authority for the proposition—irrational on its face

—that prosecuting officials are free to charge one thing and prove another, so long as the cited statute or rule remains the same. Not unexpectedly, the law is to the contrary: it is the *particulars* of a charge, not just the governing statute or rule, that must be set forth with specificity. *See, e.g., Russell v. United States,* 369 U.S. 749, 764-65 (1962). Similarly, to satisfy that requirement, it is not enough simply to set out the general outline of a charge, without more; as this Court has stated, "[n]otice of *issues to be resolved* by the adversary process is a fundamental characteristic of fair procedure." *Lankford v. Idaho,* 500 U.S. 110, 126 (1991) (emphasis added). While petitioner did know that the charge against him involved "his conduct in government and subsequent private practice," he was entitled, in addition, to know the basis upon which that conduct was under scrutiny, without having the basis changed after the evidence refuted the original allegations.

It is thus not "immaterial" that the Hearing Committee acted "on a basis not identical to that proposed by Bar Counsel" (Br. in Opp. 12). The critical question in the case was whether petitioner, while at the State Department, had participated personally and substantially in a "matter" that was substantially related to the matter that he agreed to undertake for Libya. This comparison of government and private matters made it essential for petitioner to be told just what government "matters" were at issue, especially given the fact that the Rule 1.11(a) test turns, not on whether petitioner actually *received* relevant confidential information during his work (something that petitioner could know simply from the fact that he received it), but rather on whether he *might have received* such information (something that petitioner could only speculate about, based on the definition of the particular matters). Having directed his defense to the three matters set forth in the specification of charges—

one of which (the Criminal Case) had been specifically disavowed by Bar Counsel at the hearing (R. 23, p. 298) —petitioner was then sandbagged by the recasting of the charges by the Hearing Committee, after his opportunity to contest them had closed. *See* Pet. 26-28.

Respondents claim that petitioner has shown no "discernible prejudice" from this revision of charges, Br. in Opp. 13, but the opposite is true. *See* Pet. 28. To take just one example, after Bar Counsel had expressly conceded that petitioner had not participated personally and substantially in the Criminal Case, petitioner was fully entitled to think that he had no further need to defend against the claim that he might have received material information in that case. *See Lankford v. Idaho*, 500 U.S. at 119-27.[3] Had petitioner been aware that his involvement in the Criminal Case was nevertheless still in question—as it turned out to be under the redrawn definition of the "matter" subsequently announced by the Hearing Committee—he could have, and would have, introduced evidence that, for instance, the Justice Department excluded the State Department from any involvement in the criminal investigation, and that the ominous-sounding "daily briefings" never contained any information of the sort that could possibly be regarded as useful to the later representation of Libya. That evidence would have showed that, to the extent that the briefings even

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[3] In *Lankford*, the Court found a lack of fair notice when a trial judge imposed a death sentence after the prosecution had stated that it was not seeking such a sentence. 500 U.S. at 119-27. The Court noted that this representation by the State—even though not binding on the judge—"had the practical effect of concealing from the parties the principal issue to be decided at the hearing," 500 U.S. at 126, and that, as a result, the defendant had not presented evidence going to that issue. 500 U.S. at 122-26. For that reason, the Court observed, fair notice of the critical issues is essential to the proper working of the adversary process. 500 U.S. at 127.

mentioned the investigation into the Pan American bombing (which was almost never), they set forth information of a general nature and were *not* briefings based upon the criminal investigation itself.[4] The inability to offer that proof—and thereby shut off the spiral of subsequently asserted, free-floating surmises about what the briefings might have contained—created prejudice of a very real kind.

Bar disciplinary proceedings are not meant to be a game of bait-and-switch. Here, the belated rewriting of charges denied petitioner basic due process. This Court should grant review to address and clarify the duty of professional disciplinary bodies to adhere to the charges made and tried.

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[4] Apparently not content with the rewriting of the charges by the Hearing Committee, respondents seek to rewrite them again, claiming that "there is no basis to dispute that Petitioner was personally and substantially involved in both the bombing investigation and the resulting civil litigation as a government attorney." Br. in Opp. 9. In fact, petitioner participated personally and substantially in neither. As we explain in the text, his role in the "bombing investigation" consisted of nothing other than receiving a handful of utterly uninformative reports over the course of several years. As for the "resulting civil litigation," petitioner did little more than help with the response to a single subpoena (which was ultimately quashed), an action that the Hearing Committee found *not* to amount to personal and substantial participation in that case. Pet. App. 125a. Respondents' assertions to the contrary demonstrate quite clearly the difficulties faced by a defendant confronted with ever-changing accusations of possible misconduct.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

H. BARTOW FARR, III
Counsel of Record
RICHARD G. TARANTO
FARR & TARANTO
1850 M Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 775-0184